TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 570.

JOSEPH J. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOHN WHITMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 28, 1871.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between John Whitman, plaintiff, and Joseph J. Thompson, defendant, a manifest error hath happened, to the great damage of the said Joseph J. Thompson, defendant, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirty-first day of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

(Indorsed:) U. S. circuit court. John Whitman, def't in error, ads. Joseph J. Thompson, pl'ff in error. Writ of error. Cha's N. Black, att'y for def't, & pl'ff in error.

Allowed Dec. 31, 1870.

SAM'L BLATCHFORD,
District Judge.

Filed Jan'y 3, 1871.

b SOUTHERN DIST. OF NEW YORK, *ss:*

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 102, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Joseph J. Thompson, plaintiff in error, vs. John Whitman, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 21st day of October, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the said United States the ninety-sixth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-cent int. rev. stamp, cancelled.]

1 Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, in the said southern district, of the term of April, in the year of our Lord one thousand eight hundred and sixty-three.

Witness the Honorable Samuel Nelson, judge of the circuit court of the United States for the second circuit.

KENNETH G. WHITE, *Clerk.*

Be it remembered that whereas heretofore, to wit, on the eleventh day of October, one thousand eight hundred and sixty-two, before the justices of the superior court of the city of New York, at the city hall, in the city of New York, came John Whitman, a citizen of the State of New York, by Charles A. Rapallo, esquire, his attorney, and then and there exhibited his certain bill of complaint on a plea of trespass in the said superior court against Joseph J. Thompson, a citizen of the State of New Jersey, then being in custody, &c., of the said pleas, and

2 then and there and thereupon, the said Joseph J. Thompson, by Charles A. Black, esquire, his attorney, having appeared in said action in said superior court, and at said time of entering his said appearence therein, filed his certain petition in the said superior court in and by which petition the said Joseph J. Thompson prayed as relief, among other things, that the said cause might be removed into this our said circuit court of the United States for the southern district of New York, in the second circuit, pursuant to the provisions of the statute of the United States of America in such case made and provided, and filed security as provided by said statute; and the said superior court, by its said justices, thereupon duly made its certain rule or order, bearing date the first day of November, one thousand eight hundred and sixty-two, directing that the said cause be removed into our said circuit court, pursuant to law; and the said cause was thereupon removed into this our circuit court pursuant to law.

And thereafter, to wit, on the twenty-seventh of April, one thousand eight hundred and sixty-three, of said April term, before the

3 judges of the circuit court of the United States for the southern district of New York, in the said second circuit, at the court-rooms of the said court, in the city of New York, came the said John Whitman, a citizen of the State of New York aforesaid, by Charles A. Rapallo, esquire, his attorney, and brought into the said court before the judges thereof, now here, his certain bill against the said Joseph J. Thompson, a citizen of the State of New Jersey aforesaid, being in custody, &c., of a plea of trespass; which said bill follows in these words, that is to say:

U. S. circuit court, of April term, in the year of our Lord one thousand eight hundred and sixty-three.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John Whitman, plaintiff in this suit, comes here into court, and, by Charles A. Rapallo, his attorney, suggests and gives the court now here to understand and be informed that heretofore, to wit, on the 17th day of October last past, an action was commenced in the superior court

4 of the *of the* city of New York, according to the laws of the State of New York and the rules and practice of said superior court in such case made and provided, in favor and in the name of the said plaintiff against Joseph J. Thompson, the defendant in this suit, upon and for the same causes of action hereinafter set forth.

That, at the time of the commencement of the said action, the said defendant was, by an order of one of the justices of the said superior court, made in pursuance of the course and practice of said court and of the laws of the State of New York, duly arrested and held to bail in said action in the sum of four thousand dollars.

That the said defendant, afterwards, to wit, on the twenty-eighth day of October last past, by Charles N. Black, his attorney, duly appeared in said action in the said superior court, and at the time of entering his said appearance presented to the said superior court his petition, setting forth, among other things, the commencement of
5 said action in said superior court, that said plaintiff was a citizen of the State of New York; that said defendant was a citizen of the State of New Jersey; that the matter in dispute exceeded the sum of five hundred dollars; and praying that, in pursuance of the act of Congress in such case made and provided, the said action might be removed into the next circuit court of the United States to be held in and for the southern district of New York, on the first Monday of April, in the year one thousand eight hundred and sixty-three, and offering good and sufficient surety for his entering in said court, on the first day of its session, copies of the process in said suit against him, and also for his then appearing, and entering special bail therein; that such proceedings were thereupon had; that afterwards, to wit, on the first day of November last past, by an order of the said superior court made in said action, in pursuance of the act of Congress in such case made and provided, the said action was, in due form of law, removed, for further prosecution and trial, into this court; and that the said defendant, afterwards, to wit, of this present term of this court, duly ap-
6 peared in this action in this court, and entered herein copies of the said process of the superior court of the city of New York against him, and gave special bail herein, pursuant to the rules and practice of this court and the act of Congress in such case made and provided.

Which allegations and suggestions the said defendant does not deny; but admits the same to be true.

Wherefore let the further proceedings in this suit against the said defendant be continued in this court.

And, in pursuance of said proceedings, the said plaintiff, by his said attorney, complains of the said Joseph J. Thompson, defendant in this suit, being in custody, &c., of a plea of trespass—

For that the said defendant, on the twenty-sixth day of September, in the year one thousand eight hundred and sixty-two, with force and arms, &c., on the high seas, in the outward vicinity of the Narrows of the port of New York, to wit, at and within the southern district of New York, entered upon, seized, and took a certain sloop or vessel, known
7 as the "Ann L. Whitman," together with her tackle, apparel, and furniture, and the cargo and provisions then and there being and contained in said sloop or vessel, which said sloop or vessel, her said tackle, apparel, furniture, and the said cargo and provisions then and there being and contained in her, then and there, were the property of the said plaintiff and in his possession, and then and there were of great value, to wit, of the value of ten thousand dollars; and then and there were used and employed in the lawful business of the said plaintiff, and by means whereof the said plaintiff's then and there was, and would thereafter have been, acquiring and realizing great gain and profit; and the said defendant then and there carried and took away the said sloop or vessel and her said tackle,

apparel, and furniture, and said cargo and provisions, and kept and detained the same from the said plaintiff for a long space of time, to wit, hitherto, and converted and disposed of the same to his own use; and thereby the said plaintiff was interrupted and broken up in the pursuit of his said business, and thereby lost and was deprived of all the
8 profits, benifits, and advantages which might and would otherwise have arisen and accrued to him therefrom, to wit, at and within the southern district of New York aforesaid; and also for that the said defendant, on the day and year aforesaid, with force and arms, &c., to wit, at the place aforesaid, seized, took, and carried away a certain other sloop or vessel of the said plaintiff, together with certain other goods, wares, merchandise, and chattels of the said plaintiff then and there found, and being of great value, to wit, of the value of ten thousand dollars, and kept and detained the same from the said plaintiff for a long space of time, to wit, hitherto, and converted and disposed of the same to his own use, to wit, at the place aforesaid.

And also for that the said defendant, on the day and year aforesaid, with force and arms, &c., to wit, at the place aforesaid, seized, took, and carried away divers other goods, chattels, merchandise, and personal property of the said plaintiff, to wit, one certain other sloop or vessel, her tackle, apparel, and furniture; one certain boat called a "garvey," one certain yawl-boat, three tons of pig-iron, three tons of scrap-iron, three tons of iron, a large quantity of provisions, and a large
9 quantity of clothing then and there found, and being of great value, to wit, of the value of ten thousand dollars, and converted and disposed of the same to his own use, to wit, at the place aforesaid.

And also for that the said defendant, on the day and year aforesaid, with force and arms, &c., to wit, at the place aforesaid, made an assault upon the said plaintiff, and did then and there beat, wound, and ill-treat him, the said plaintiff, and other wrongs to him the said plaintiff then and there did, against the peace of the people of the United States of America, and to the damage of the said plaintiff of ten thousand dollars.

And also for that the said defendant, on the day and year aforesaid, with force and arms, &c., to wit, at the place aforesaid, made another assault upon the said plaintiff, and did then and there beat, wound, and ill-treat him, the said plaintiff, and did then and there, with like force and arms, wrongfully and falsely imprison him, the said plaintiff, without any reasonable, probable, or lawful cause whatever, and him, the said plaintiff, so then and there imprisoned, did keep and detain for a long space of time next thereafter, to wit, for the space of seven hours, to wit, at the place aforesaid; and other wrongs and injuries to
10 him, the said plaintiff, then and there did against the peace of the people of the United States of America, and to the damage of the said plaintiff of ten thousand dollars.

And the said plaintiff avers that he is a citizen of the State of New York, that the said defendant is a citizen of the State of New Jersey, and that the matter in dispute in this action exceeds the sum of five hundred dollars.

All which is to the damage of the said plaintiff of ten thousand dollars, and therefore he brings his suit, &c.

CHA'S A. RAPALLO,
Attorney for Plaintiff.

(Endorsed:) U. S. circuit court. John Whitman vs. Joseph J. Thompson, Narr. Cha's A. Rapallo, att'y for def't. Filed April 27, 1863.

11 And then and there, as aforesaid, came the said Joseph J. Thompson, a citizen of the State of New Jersey, by Charles A. Black, esquire, his attorney, and brought into the said court, before the judges thereof, now here, his certain plea; which said plea is in the words and figures following, that is to say:

U. S. circuit court, April term, in the year of our Lord one thousand eight hundred and sixty-three.

JOHN WHITMAN
ag'st
JOSEPH J. THOMPSON.

And the said defen'ant, by Charles N. Black, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any, or either of them, or any part thereof in manner and form as the said plaintiff hath above thereof complained against him; and of this he, the said defendant, puts himself on the country, etc.

And for a further plea in this behalf as to the said seizing,
12 taking, carrying, taking away, detaining, converting, and disposing to his, defendant's, own use of a certain sloop or vessel known as the Ann L. Whitman, together with her tackle, apparel, and furniture, and the cargo and provisions then and there being and contained in said sloop or vessel, and a certain other sloop or vessel of the said plaintiff, together with certain other goods, wares, merchandise, and chattels of said plaintiff then and there found, and divers other goods, chattels, merchandise, and personal property of said plaintiff, to wit, one certain other sloop or vessel, her tackle, apparel, and furniture, one certain boat called a "garvey," one certain *gavel*-boat, three tons of pig-iron, three tons of scrap-iron, three tons of iron, a large quantity of provisions then and there found, as in said first, second, and third counts of the said narration mentioned, and as to the said assaulting, beating, wounding, and ill-treating, and wrongfully and falsely imprisoning said plaintiff, as in the said fourth and fifth counts of the said narration mentioned, the said defendant, by leave of the court here for that purpose first had and obtained, according to the form of the stat-
13 ute in that case made and provided, saith that said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that, on the fourteenth day of April, 1846, the legislature of the State of New Jersey revised and approved an act entitled "An act for the preservation of clams and oysters," a copy of which act, and copies of the various supplements thereto, with the several dates of their passage, are hereto attached and made a part of this plea; which said act, from said date of its said passage, and said supplements from said dates of their said several passages, as appears on said copies hereto attached, became, at the dates of their said several passages, and were, at the time of the matters and things complained of in said counts of said narration mentioned, to wit, on or about the 26th day of September, 1862, the law of the State of New Jersey; that, at the said time, to wit, on or about the said 26th day of September, 1862, defendant was the sheriff of the county of Monmouth, in said State of New Jersey, duly elected and established in his office as such by the laws of said State, and that at said time said plaintiff had charge, control, and command of said sloop or vessel known as the Ann L. Whitman, men-
14 tioned in plaintiff's narration as aforesaid, as master and owner,

or part owner thereof; that, at or about said time said plaintiff, with others in his employ or under his control and command as hired hands on board of said sloop or vessel, were in the waters of Raritan Bay, within the State of New Jersey, to wit, in that part of said Raritan Bay westwardly of the middle thereof, within the boundaries of the county of Monmouth, in said State of New Jersey, and in the cove between Sandy Hook and the main shore of said Monmouth County, about midway between Sandy Hook and the bay shore, with dredges, clam-rakes, boats, scows, and tongs, said "garvey" and said *gavel*-boat, and other implements engaged on board of said sloop or vessel, and said boat called a "garvey," and said gavel-boat, raking and gathering clams and putting the same on board of said vessel, either on their own account and benefit or on account and benefit of their employers, and then and there using and employing said vessel, dredges, clam-rakes, boats, scows, tongs, said "garvey" and said *gavel*-boat, and other implements for that purpose, contrary to and in violation of said act, and supplement, of said legislature of said State of New Jersey, in such case made and provided; that at same time said plaintiff, and said persons in his employ, or under his control as hired hands on board of said sloop or vessel, and on said boats as aforesaid, and
15 said employers were inhabitants and residents of the State of New York, and neither said plaintiff, nor said persons, nor said employers, nor any or either of them were then actual inhabitants or residents of said State of New Jersey, nor had said plaintiff, nor said persons, nor said employers, nor any nor either of them, been actual inhabitants or residents of said State of New Jersey for six months next proceeding said time; that, at said time, and there within the waters of said State of New Jersey, and within the boundaries of said county of Monmouth, in said State as aforesaid, said defendant being sheriff as aforesaid of said county, as required by said laws of said State of New Jersey, and as by said laws it was lawful for him to do, seized and secured said sloop or vessel, together with said scows, boats, all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel then and there on or belonging to said sloop or vessel so employed as aforesaid, and said boat, called a "garvey," and said *gavel*-boat, for such offence; and immediately thereupon, as required by said law, he gave information thereof to two of the justices of the peace of said county of Monmouth, to wit, Joseph W. Borden and William C. Irwin, whereupon said
16 justices of the peace, according to the provisions of said act, did appoint the sixth day of October, 1862, at 10 o'clock in the forenoon, at the village of Riceville, in the township of Middleto'n, at the hotel of Holmes Hendrickson, in said county of Monmouth, for the trial of said sloop or vessel and said scows, boats, all the clams, oysters, clam-rakes, tongs, tackles, furniture, and apparel then and there on or belonging to said vessel, and said boat called a "garvey," and said *gavel*-boat; and said justices did then meet at the place appointed according to such appointment, for the trial of said sloop or vessel, and said scows, boats, all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel then and there on or belonging to said vessel, and said boat called a "garvey," and said *gavel*-boat, and heard and determined the same, and did then and there condemn the same; and the same, afterwards, to wit, on the 25th day of October, 1862, was sold by the order and under the direction of said justices in consequence of said condemnation, according to said law of said State of New Jersey; that said seizure of and taking said sloop or vessel and said scows, boats,
17 all the clams, oysters, clam-rakes, tongs, tackle, furniture, and

apparel then and there on or belonging to said vessel, and said boat called a "garvey," and said *gavel* boat so employed as aforesaid, away from the plaintiff, by the defendant, was made and done only with such force and assistance as was necessary to get lawful possession of the same as aforesaid, and no more; and all allegations, in said narration of plaintiff, of assault, battery, assault and false imprisonment, taking and converting property of plaintiff's by defendant, and in that behalf, are false and untrue; and so said defendant saith that if any hurt or damage then happened to said plaintiff, or to his personal property, or to said vessel, said scows, boats, all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel then and there on or belonging to said vessel so employed as aforesaid, and said boat called a "garvey," and said *gavel*-boat, the same was occasioned by said lawful acts of defendant in seizing said vessel, scows, boats, all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel belonging to said vessel so employed as aforesaid, said boat called a "garvey," and said *gavel*-boat and said seizure, and the necessary acts of defendant connected therewith as aforesaid, are the same supposed trespasses as those
18 complained of in said narration; and said seizure and said necessary acts were made and done in the State of New Jersey, as aforesaid, for the reason aforesaid, and not in the State of New York, as stated in plaintiff's narration; and of this defendant is ready to verify.

Wherefore the defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

CHA'S M. BLACK,
Att'y for Def't.

I certify, in my opinion, that the above plea is well founded.
New York, June 25th, 1863.

CHA'S N. BLACK,
Of Counsel for Def't.

19 An act for the preservation of clams and oysters. Revision approved April 16, 1846.

1. *Be it enacted by the senate and general assembly of the State of New Jersey*, That, from and after the first day of May until the first day of September, yearly, and every year, no person, under pretence of taking clams or shell-fish, or any other pretence whatsoever, shall rake on any oyster-bed in this State, or gather any oysters or shells on any banks or beds within the same, and in case any person shall so do, whether oysters be taken or not, he shall for every offence forfeit and pay ten dollars, to be recovered with costs by action of debt, by any person who shall prosecute for the same in any court of record in this State, having cognizance of that sum, one moiety thereof to the use of the prosecutor and the other moiety to the county collector, for the use of the county in which the offence was committed; provided that nothing in this section shall be so construed as to prohibit any person or persons from taking oysters from beds planted out by him or them pursuant to this law.

20 2. *And be it enacted*, That, in case any person, residing in or without this State, shall, at any time hereafter, rake for or gather oysters in any of the rivers, bays, or waters of this State with a dredge or instrument so called, or shall be on board of any canoe, boat, or vessel employed in raking with such implement, such person so offending shall forfeit and pay the sum of fifty dollars, to be recovered in the man

ner and for the use mentioned in the next proceeding section; provided that this and the sixth sections shall not extend, so far as regards persons residing in this State, to the Delaware Bay.

3. *And be it enacted*, That it shall be the duty of every justice of the peace, upon his own view, or the information of any person on oath or affirmation, to issue his warrant to one or more of the constables of his county, commanding him or them to require such and so many persons as he or they deem necessary to aid and assist him or them in apprehending every person offending against either of the proceeding sections in any of the bays, rivers, or waters of this State, and forthwith to bring such offender, when apprehended, before the said justice or any other justice of the peace of said county, to be proceeded against in the manner hereinbefore directed.

4. *And be it enacted*, That if any person shall hereafter sell or offer for sale oysters in any part of this State, between the first day of May and the first day of September, such person shall, for every such offence, forfeit and pay five dollars, to be recovered and applied in manner directed in and by the first section of this act.

5. *And be it enacted*, That if any person shall, at any time hereafter, rake or gather oysters in any of the rivers, bays, or waters of this State, for the purpose of burning or converting them into lime, or for the purpose of conveying them to any of the landings to be used in the manufacture of iron in any of the furnaces in this State, or shall land them on any bank or landing for either of the purposes aforesaid, every person so offending shall forfeit and pay fifty dollars for each and every offence, to be recovered and applied in manner directed by the first section of this act.

6. *And be it enacted*, That no canoe, scow, boat, or vessel employed in navigating any of the waters, bays, or rivers of this State shall have on board of the same any instrument called a dredge for catching or raking oysters or shell-fish, and the master, or owner or owners of every such canoe, scow, boat, or vessel, that shall have on board of the same any such instrument, shall forfeit the sum of fifty dollars, to be recovered in the manner and for the use mentioned in the first section of this act.

7. *And be it enacted*, That it shall not be lawful for any person who is not at the time an actual inhabitant and resident of this State, and who has not been for six months next proceeding an actual inhabitant or resident, as aforesaid, to rake or gather clams, oysters, or shell-fish either on his own account and benifit, or on account and benifit of his employer, in any of the rivers, bays, or waters of this State, on board of any canoe, flat, scow, boat, or other vessel, and every person who shall offend herein shall forfeit and pay twenty dollars, to be recovered and applied in the manner directed by the first section of this act; and the said canoe, flat, scow, boat, or other vessel used and employed in the commission of such offence, with all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel, shall be forfeited, and the same seized, secured, and disposed of in the manner prescribed in the ninth and tenth sections of this act.

8. *And be it enacted*, That any action under the first, sixth, or seventh section of this act may be commenced by warrant in the court for the trial of small causes, and be proceeded in as in other cases when the same are commenced by warrant, any law, usage, or custom to the contrary notwithstanding.

9. *And be it enacted*, That it shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons to seize and

secure any such canoe, flat, scow, boat, or other vessel as aforesaid, and, immediately thereupon, give information thereof to two justices of the peace of the county where such seizure shall have been made, who are hereby empowered and required to meet at such time and
24 place as they shall appoint for the trial thereof, and hear and determine the same; and, in case the same shall be condemned, it shall be sold by the order and under the direction of said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offence shall have been committed, and the other half to the person who shall have seized and prosecuted the same.

10. *And be it enacted*, That if any person or persons on board of any such canoe, flat, scow, boat, or other vessel aforesaid, shall refuse and not suffer to enter the same, or resist before or after entering, any of the said officers or other person or persons seizing the same, or otherwise resist them, or any of them, in the lawful seizing of the same, then every person so offending shall forfeit and pay the sum of thirty dollars, to be recovered and applied in manner directed by the first section of this act.

11. *And be it enacted*, That it shall be lawful for any person or persons owning marsh or meadows in this State, within the boundaries of
25 which there shall be creeks, ditches, or ponds wherein oysters do or will grow, and where such creeks or ditches do not lead to any public landing, to lay or plant clams or oysters therein for the use and benefit of such owners, and for the preservation of which to erect a fence, hang or affix gates or locks across said creeks or ditches, to prevent any person or persons from entering the same.

12. *And be it enacted*, That if any person be found with any craft, boat, or raft, above or within the aforesaid fences, gates, or locks, without leave from the owner or occupant of any creek, ditch, or pond, fenced, gated, or locked as aforesaid, wherein clams or oysters may be laid or planted, or shall in any way break or destroy such fence, gate, or lock, he, she, or they so offending shall severally forfeit and pay, for each and every offence, the sum of fifty dollars, to be recovered by action of debt, with costs, in any court having cognizance thereof, by any person who shall prosecute for the same; one half to the use of the owner or occupant of such creek, ditch, or pond, and the other half to the person
26 who shall sue for the same: *Provided*, that nothing herein contained shall be so construed or understood as to obstruct or prevent the free navigation of any thoroughfare, creek, or channel leading from or out of any of the bays or principle waters to any other bay or principal water, or to any accustomed landing-place in this State, *and* anything hereinbefore contained to the contrary notwithstanding.

13. *And be it enacted*, That it shall not be lawful for any person or persons to rake, or take with tongs, or otherwise gather or carry away any oysters, other than by wading in and picking up by hand the same, within the following bounds in the river, commonly called or known by the name of the North or the Navesing River, lying within the county of Monmouth, and dividing the township of Shrewsbury from the township of Middletown, above a direct line from the stone house of Eseck White, on the Shrewsbury side of the river to the dwelling-house of Thomas Layton, on the Middletown side of the river aforesaid; and, in case any person or persons shall be found offending against this prohibition, he, she, or they so offending shall forfeit and pay, for every such offence, the sum of ten dollars, to be recovered in an action of debt, with costs, before any justice of the peace in the county of Mon-

27 mouth, by any person who shall sue for the same; the one half to the use of the prosecutor, and the other half to be paid to the county collector to and for the use of the county.

14. *And be it enacted*, That it shall and may be lawful for any person or persons owning flats or coves along the shores of the tide-waters in the county of Atlantic, between the Great Egg Harbor and Little Egg Harbor Rivers, inclusive of the shores of so much of said rivers as lie within the said county of Atlantic, to ma'ke out by fixing stakes across or around the same at the distance of two rods from each other, and of such length as to be at least two feet above the ordinary high water, and plant or lay clams, oysters, or other shell-fish within or about the same; provided such stakes shall not include any natural oyster-beds always covered with water beyond low water-marks; and provided also, it shall not be lawful to stake out beyond the ordinary low-water mark, nor injure any navigation publicly used.

15. *And be it enacted*, That if any person or persons shall gather
28 or take away any oysters or clams above or within the line of the stakes aforesaid, without permission first had or obtained from the owner or owners, occupant or occupants, of the flats or coves so staked in, he, she, or they so offending, shall forfeit and pay for each offence the sum of twenty dollars, to be recovered and applied in manner directed by the twelfth section of this act, and shall moreover be liable to an action at the suit of the owner or owners, occupant or occupants, for his, her, or their damages.

16. *And be it enacted*, That it shall and may be lawful for the owner or owners, of any person or persons having a license in writing from the owner or owners of meadow or other lands which are opposite or contiguous to flats which are at any time bare, or coves, upon or within which flats or coves there have not been heretofore any natural oyster-beds, along the shores of such parts of the Newark Bay and Staten Island Sound as lie within the township of Elizabeth, to plant and lay clams, oysters, or other shell-fish upon, within, or above such flats and coves, and one chain beyond the same; provided, the clams and
29 oysters thus planted shall be enclosed and designated by stakes placed beyond them, within the prescribed limits, not less than six rods apart, and of such length as to be at least two feet above ordinary high water; and provided also, that this section shall not be so construed as to take away or in any wise impair the common rights of citizens to any natural oyster-beds which may be embraced by the boundary herein specified.

17. *And be it enacted*, That any person or persons who shall gather or take away any oysters or clams upon, above, or within the limits aforesaid, without permission first had and obtained from such owner or owners, person or persons occupying under such owner or owners, as aforesaid, shall be liable to the same forfeitures and the like suits for damages, to be recovered and sued for in manner as is directed and provided in the fifteenth section of this act; provided that nothing in this act shall prevent the legislature from the repeal or modification of this and the last foregoing section at their pleasure.

18. *And be it enacted*, That in coves and places where notorious
30 and plain ranges of landmarks can be erected and established on contiguous shores, whereby the boundaries of planted beds of oysters may be clearly known and distinguished without danger of mistake, and where, in such covers or place', such notorious or plain ranges or marks on contiguous meadows or shores shall have been erected and established by stakes or other plain monuments, so that they may be

plainly known and distinguished without danger of mistake, and due notice thereof being given, that then and in such cases the provisions of the two last foregoing sections in regard to the planting and setting up of the stakes may be dispensed with in respect to such places as above described.

19. *And be it enacted*, That the time within which the taking and vending of oysters is prohibited by the first and fourth sections of this act is hereby extended to the first day of October, yearly and every year, in the counties of Burlington, Monmouth, and Atlantic only, under the same penalties and regulations as are therein contained; provided, that planted oysters may be taken up at any time by the person owning the same.

31 20. *And be it enacted*, That no person or persons, *or* under any pretence of taking oysters, or under any other pretence whatever, shall take, remove, or carry off from any natural oyster banks or bed in this State any old shells, other than such as cannot be removed or seperated from the oysters without injuring the same; and all such shells shall be culled and seperated from the oysters and thrown back again upon the said natural banks or beds; and in case any person or persons shall so take, remove, or carry off from said natural banks or beds, whether oysters be taken or not, without first so seperating the old shells from the oysters, he or they shall for every offence forfeit and pay ten dollars, to be recovered with costs by action of debt by any person who shall prosecute for the same in any court of record in this State having cognizance of that sum, one half thereof to the use of the prosecutor, and the other to the overseer of the poor for the use of the poor of the township in which the offence was committed, and the canoe, flat, scow, boat, and other vessel used and employed in the commission of the offence in this section mentioned, shall be liable to seizure, and be applied to the payment of such penalty; provided, however,

32 that nothing in this act contained shall be so construed as to prohibit any person or persons from taking, removing, or carrying any shells from beds planted out by him or them pursuant to law.

21. *And be it enacted*, That it shall not be lawful for any person or persons to sell or offer for sale, by the bushel or otherwise, any small clams which may have been taken in the waters of the county of Atlantic, unless the said clams shall be of such a size that a bushel will not contain more than four hundred; and if any person or persons shall so sell or offer for sale any such clams, four hundred of which will not make a bushel, such person or persons shall, for every such offence, forfeit and pay ten dollars, to be recovered with costs by action of debt by any person who shall prosecute for the same in any court of record in this State having cognizance of that sum, one half to the overseer of the poor for the use of the poor of the township in which the offence shall have been committed, and the other half to the person who shall sue for the same.

33 A further supplement, approved March 19th, 1851.

SEC. 1. It shall not be lawful for any person who is not at the time an inhabitant and resident of this State, and who shall not have been for six months next proceeding an inhabitant and resident as aforesaid to take, rake, or gather oysters, clams, or shell-fish, in any of the rivers bays, or waters of this State, and every person offending herein shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court before

which the conviction shall be had; provided such imprisonment in any case shall not exceed the term of six months, nor the fine exceed the sum of one hundred and fifty dollars.

SEC. 2. Every person offending against the provisions of the twelfth section of the act to which this is a supplement, shall, in addition to the penalty therein mentioned, be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine, imprisonment, or both, in the discretion of the court before which the conviction shall be had; provided, such imprisonment shall not exceed, in any case, the
34 term of six months, nor the fine exceed the sum of one hundred dollars.

Supplement, approved March 18, 1852.

The period limited for the raking or taking of clams and oysters in any beds or banks within the State, contained in the first section of the act to which this is a supplement, shall, so far as relates to the county of Hudson, be extended from the first day of May to the first day of July, in each and every year.

A further supplement, approved February 22, 1853.

The time within which the taking and vending oysters is prohibited by the first and fourth sections of the act to which this is a supplement is, and that the same be, extended to the first day of October, yearly, and every year, in the county of Cape May, under the same penalties and regulations as are therein contained; provided, that nothing contained in this act shall prevent the owners of planted oysters from at any time taking up and vending the same.

A further supplement, approved March 9, 1855.

35 It shall be lawful for any person or persons owning marsh or meadow lands in this State, within the boundaries of which there shall be creeks, ditches, or ponds wherein clams and oysters do and will grow, to lay or plant clams and oysters therein, for the use and benefit of such owners; and for the preservation of which he is to properly stake off such clam and oyster ground as not to interfere with the passing and repassing of vessels, but sufficient to designate where the same is planted; provided that the provisions of said bill shall not be so construed as to apply in any way to any such creeks, ditches, or ponds within the county of Cumberland.

SEC. 2. Any person or persons violating the provisions of this act shall be subject to all the fines and penalties contained in the act to which this is a further supplement.

Supplement of 1856 requires oysters taken from the beds of Mullion River to be sold by the standard bushel.

Act of 1857 prohibits dredging in Dennis Creek.

(Endorsed:) U. S. circuit court. John Whitman vs. Joseph J. Thompson. Plea. Filed June 30, 1863.

36 U. S. circuit court.

JOHN WHITMAN
ag'st
JOSEPH J. THOMPSON.

And the said plaintiff as to the said plea of the defendant by him first above pleaded, and whereof he hath put himself upon the country doth the like.

And the said plaintiff, as to the said plea of the defendant by him secondly above pleaded, says that he, the said plaintiff, ought not, by reason of anything by the said defendant in that plea alleged, to be barred from having and maintaining his aforesaid action thereof against the said defendant, because this plaintiff says that he was not at or about the time or times of the commission of the wrongs complained of in the declaration, or, at or about the time or times in said plea in that behalf alleged either *or* alone or with others, or with persons in his employ or under his control or command as hired hands, or otherwise, on board of the sloop or vessel in said plea mentioned, nor was said sloop or vessel in the waters of Raritan Bay, or within the State of New Jersey, or
37 in that part of said Raritan Bay westwardly of the middle thereof, or within the boundaries of the county of Monmouth, in said State of New Jersey, or in the cove between Sandy Hook and the main shore of said Monmouth County, and was not engaged on board of said sloop or vessel, or said boat called a garvey or yawl-boat, nor was he engaged, nor were said sloop or vessel, or said boats or any of them, or any person or persons on board of either engaged, in raking or gathering clams, or putting the same on board of said vessel, either on their own account or benifit, or in account and benefit of their employees or in any manner or for any account whatever, nor was the plaintiff or any other person or persons then or there using or employing said vessel, dredges, clam-rakes, boats, scows, tongs, garvey or yawl boat in said plea mentioned, or any of them, or any implement whatever appertaining to said sloop or vessel or any of the property in the declaration mentioned for that purpose, in manner and form as the said defendant hath in his said second plea alleged; and the plaintiff avers that said sloop, boats, and other property were *and* not seized or condemned or sold accord-
38 ing to the law of the State of New Jersey in manner and form as is alleged in said plea, but were seized and taken by the defendant on the high seas, without authority of law, and without the territorial jurisdiction of any State, to wit, within the southern district of New York as alledged in the said declaration.

And this, the said plaintiff prays may be enquired of by the country, &c. And the said defendant likewise, &c.

CHA'S A. RAPALLO,
Att'y for Pl'ff & of Counsel.

(Endorsed:) U. S. Whitman ag'st Joseph J. Thompson. Copy replication. Cha's A. Rapallo, att'y for pl'ff. Rec'd Sept. 16, 1863.

SIR: Please to take notice the replication of the plaintiff in the above action of which a copy is herewith served, was duly filed in the office of the clerk of this court, on the 15th day of September, 1863.

Dated N. Y., September 16th, 1863.

Yours, &c.,

CHA'S A. RAPALLO,
Att'y for Pl'ff.

To CHA'S N. BLACK,
Att'y for Def't.

39 And thereupon the issue so as aforesaid joined, was ordered to be tried at a circuit court of the United States of America, for the southern district of New York, appointed to be held in and for the southern district of New York, on the third Monday of October, of the term o October, in the year one thousand and sixty-three. And afterwards,

that is to say, at the said October term at the court-rooms aforesaid, to wit, on the nineteenth day of January, one thousand eight hundred and sixty-four, before the Honorable William D. Shipman, circuit judge, came the said within-named John Whitman, plaintiff, by his attorney aforesaid, and also the said within-named Joseph J. Thompson, defendant, by his attorney aforesaid, and the jurors of the jury summoned to try the said issue being also come, who to speak the truth of the matters within contained being chosen, tried, and sworn, say upon their oaths that they assess the damages of the said plaintiff over and above his costs and charges by him about his suit in this behalf expended, at the sum of three thousand five hundred dollars, and for those costs and charges to six cents.

40 And the said jurors upon their oath aforesaid further say, that the seizure in the declaration of the said plaintiff within set forth, was made within the limits of the State of New Jersey.

And the said jurors, upon their oath aforesaid, further say, that the seizure aforesaid was not made within the limits of the county of Monmouth, in the State of New Jersey aforesaid, in manner and form as the said defendant in that behalf hath in his plea within alleged.

And the said jurors, upon their oath aforesaid, further say, that the plaintiff was not, on the 26th day of September, one thousand eight hundred and sixty-two, engaged with dredges, clam-rakes, boats, scows, and tongs, or other implements in raking and gathering clams in the county of Monmouth, in the State of New Jersey aforesaid, in the manner and form as the defendant in that behalf hath in his plea within alleged.

And the jurors, upon their oath aforesaid, further say, that the plaintiff sustained damages to the extent of three thousand five hundred dollars for the trespass and seizure, as the plaintiff hath in that behalf within alleged.

41 And now on this day, to wit, on the third Monday of October of the term of October, in the year one thousand eight hundred and sixty-eight, at the court-rooms of our circuit court aforesaid, in and for the second circuit and southern district of New York, before the Honorable Samuel Nelson, judge of said circuit court, came the parties aforesaid, by their attornies aforesaid; and the said defendant, by his said attorney, brings into the said circuit court a certain bill of exceptions, taken upon the trial of the issues aforesaid and filed with the clerk of said circuit court as aforesaid, and hereupon the said bill of exceptions, on the prayer and motion of the said defendant, is entered upon the record of proceedings in this cause, and is enrolled in the words and figures following, to wit:

Circuit court of the United States for the southern district of New York.

JOHN WHITMAN
ag'st
JOSEPH J. THOMPSON.

Afterwards, to wit, at a circuit court of the United States for the southern district of New York, held at No. 41 Chambers street, in the city of New York, on the twentieth day of January, in the year one thousand eight hundred and sixty-four, before William D. Shipman, esquire, one of the circuit court judges, appointed to hold

42

the said circuit court, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the aforesaid parties came on to be tried by a jury of the southern district of New York, for that purpose duly empannelled, good and lawful men of the said district, at which day came then, as well the said plaintiff as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, empannelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue.

And upon the trial of the said issue the counsel for the said plaintiff, to maintain and prove the said issue on his part, called a number of witnesses, who, being duly sworn, gave testimony tending to show that, at the time referred to in the pleadings in this action, the plaintiff resided on Staten Island, in the State of New York, and carried on the business of clamming; that he owned the sloop Ann L. Whitman, enrol'ed at the New York custom-house at 49$\frac{47}{49}$ tons; that, about nine o'clock in the morning of the 26th September, 1862, the plaintiff left the Great Kilns Harbor on the Staten Island shore, in command of this sloop,
43 a young man and boy with him as hired hands; that they drifted down the main ship-channel near to Southwest Spit, and there fastened the sloop to the "Memento," a sloop commanded by Capt. Ruland; that, after that, the plaintiff did not throw out his rakes; that after fastening the sloop' together they drifted with the ebb-tide down near to Sandy Hook abreast of the Narrows; that the plaintiff then seperated his vessel from the Memento and run up a northwest course from the Southwest Spit; that she then had all sails set, steering for home; that the defendant then came up with his steamboat, having on board a number of men armed with guns, and by force seized plaintiff's vessel; that defendant took the vessel and her tackle, &c., also some clams caught the day before in the main ship-channel off the Great Kilns; that the sloop and other articles on board were worth $2,500; that some violence was done to the plaintiff, and he was struck several times by the defendant's crew; that the captain broke open the cabin-drawer and took plaintiff's personal effects; that the seizure took about 3 o'clock in the afternoon; that the defendant then took the vessel, with plaintiff and his crew on board, up the Shrewsbury River, opposite defendant's house, where he anchored her for the night;
44 that plaintiff remained there till the following morning. He never got back his sloop or property. The sloop was seven or eight miles from Coney Island at the time of the seizure, and nearer the Jersey shore than the New York shore, four or five miles from the Jersey shore and seven or eight miles from Coney Island, in the main ship-channel; that the sloop had been in the neighborhood of the Southwest Spit and Sandy Hook, something like three hours before she was seized, drifting nearly or quite abreast of the Hook. The main ship channel runs down southerly from the New York Harbor, and then turns easterly and passes by the Hook; that when the sloop was seized, she had all sails set; that there were four rakes on the vessel at the time she was seized; that some worked by ropes and some not; that the plaintiff threw them overboard for clams that day, during the first two or three hours they were out. Caught about a basketfull of clams in the channel off the Great Kilns, nearer the Staten Island shore than the Jersey shore, not much more than one hundred; that the plaintiff did not that day dredge or rake for clams south of the line running through the centre of Raritan Bay. Seven witnesses were called by the plaintiff, who gave testimony tending to fix the place of seizure as above set forth.

45 And thereupon the counsel for the defendant, to maintain and prove the issue on his part, called a number of witnesses, who, being duly sworn, gave testimony tending to show that, as early as half past eight o'clock, on the morning of the 26th of September, 1862, the "Whitman" was not less than two miles south of that arm of the main ship-channel that runs by Sandy Hook; that, about half an hour previous, she was seen coming from the Great Kilns under full sail. Her sails were all set; that, just before the seizure, the Whitman was dredging for clams in that position with her jibs lowered or settled away with mainsail-sheet started or eased off; that this is the position of a vessel raking for clams; she was then about two miles south of the Southwest Spit buoy; that she was, when seized, under way sailing a northwest course from where she was dredging; that the defendant was then sheriff of the county of Monmouth, in the State of New Jersey, and lived on the Highlands, and was, as such sheriff, induced to make the seizure of the Whitman by reason of a letter, written by the governor of the State of New Jersey.

[VIGNETTE.]

STATE OF NEW JERSEY,
EXECUTIVE DEPARTMENT,
September 20th, '62.

46 CHA'S SEARS, esq., & others:

GENTLEMEN: Your letter complaining of the illegal acts of people living out of this State in dredging or otherwise taking clams within the waters of this State, was presented to me by Mr. Hooper, and has received my consideration.

When the remedy for the infraction of a statute is provided in the statute itself, the executive of the State has no power to interfere and substitute a different remedy; the parties ag'rieved must resort to the civil remedies provided by law, and if the authority of the officers of the law, aided by the civil force, which, by the terms of the act, they may summon to their assistance, should be violently and successfully resisted, so that it is apparent that *that* the civil force is insufficient to execute the law, the executive may intervene and furnish the necessary aid.

Now, in this case, the act for the preservations of clams and oysters provides ample remedies against persons infringing its provisions—they may be arrested; their vessels seized, and forfeited, and the sheriff, or constable, in executing the law, may summon the whole power of the county to his aid. Until this remedy is resorted to, and it is ap-

47 parent that the law-breakers are strong enough to defy the officers of the law and the force they may legally summon to aid them, I shall have no power to act in the matter.

Very respectfully,

CHA'S S. OLDEN.

Your better course would be to employ counsel, and take the proper steps to enforce the penalties of the law against offenders.

Your ob't serv't.

That the defendant made the seizure, through the aid of a steam-tug employed for that purpose in the city of New York; this tug steered two miles south or southwest of the Southwest Spit buoy, and there seized the Whitman; that she was about half way between Sandy Hook and Port Monmouth dock, about half a mile south of a line drawn from

Port Monmouth dock to Sandy Hook dock; that when the seizure was made, the plaintiff said that he had taken counsel, and that he had a right to dredge there; that he had a right to take for clams anywhere in the waters of the United States; that when the Whitman was seized she was very nearly three miles south of the middle of the main ship-channel that runs by Sandy Hook, south-by-west of the South-
48 west Spit buoy, and on the west clamming grounds, in New Jersey waters, about three-quarters of a mile from Port Monmouth dock; some of the clams on board were wet and muddy; that, about half-past ten o'clock that morning, the Whitman was dredging near Sandy Hook; that the notice read in evidence was served upon the plaintiff by leaving it at his residence, on Staten Island, a week before the hearing before the justices.

To JOHN WHITMAN, *captain and alledged owner*:

Notice is hereby given you by us, the subscribers, two justices of the peace, of the County of Monmouth, in the State of New Jersey, that information has been given unto us by Michael Fay of the seizure by him of a certain boat or vessel called the Ann L. Whitman, said to be owned by you, at the township of Middletown, in said county, on the 26th day of September, 1862, and said to have clams on board gathered by you in the said State of New Jersey, in the waters of the State of New Jersey, to wit, in Raritan Bay, in the County of Monmouth, in said State; and said vessel having been used and employed to gather clams in said waters of New Jersey, contrary to the form and effect of the statute in such case made provided, you being then a resi-
49 of the State of New York; and praying of us that the said vessel, and clams, her tackel, furniture, and apparel, may be adjudged forfeited, and sold under our order and direction, and the one moiety of the proceeds of the sale thereof, after deducting legal costs and charges, be paid to the said Michael Fay; we, therefore, have appointed Monday October 6th, 1862, at 10 o'clock a. m., at the house of Holmes Hendrickson, at Riceville, in the township of Middletown, in said county, for the trial of said seizure, when and where you may attend to answer and make defence against the said information, if you think proper.

September 30th, 1862.

JOSEPH W. BORDEN,
W'M C. IRWIN,
Justices.

That, between nine and eleven o'clock that morning, the Whitman was dredging for clams near Mill's dock, about a mile and a quarter from Port Monmouth dock, and three to three and a half miles south of the Southwest Spit buoy; that the men on board of her hauled their rakes in, and as they hauled them in they took the clams out and put them into baskets, and then threw them overboard again; that they were clamming below the Gover'ment dock towards Thomp-
50 son's; that the Whitman was around there until the "Only Son" came down.

The defendant's counsel then propounded the following questions to witness Lewis.

Had you seen the Whitman on the water between Sandy Hook and Port Monmouth dock dredging for clams before the 26th September, 1862?

(The question was objected to by the plaintiffs' counsel; the learned judge excluded the question, to which the defendants' counsel duly excepted.)

The defendant's counsel offered to prove that the plaintiff was raking and dredging for clams with the Ann L. Whitman in the waters of Sandy Hook Bay between Port Monmouth dock and Sandy Hook, and south of the main channel which runs east and west by Sandy Hook, on the 23d, 24th, 25th of September, 1862; to which plaintiffs' counsel objected, and the learned judge thereupon excluded the evidence; and the defendant's counsel excepted. That the plaintiff was not struck or assaulted by the defendant, nor any one on the steam-tug; that only one of the men on the tug had a gun; nor was the drawer of the Whitman broken open, nor anything taken therefrom; the plaintiff accompanied his vessel up the river to the house of the defendant, and remained there all night voluntarily, and left in the stage next morning at about six or seven o'clock.

Twenty-one witnesses were called by the defendant, all of
51 whose testimony tended to fix the place of seizure as above set forth on the part of the defendant.

WILLIAM C. IRWIN, being duly sworn for the defendant, testified as follows:

I resided in Middletown, Monmouth County, New Jersey. During the year, 1862, I was a justice of the peace of the County of Monmouth. That is my signature to the paper, marked "D," now shown to me. I saw Joseph W. Borden subscribe his name to the papers at the same time as I subscribed mine. That is his signature, signed Joseph W. Borden. He was, at this time, a justice of the peace of the township of Shrewsbury and county of Monmouth. He resided at Red Bank. The seals affixed to the paper were placed there at the time our signatures were placed there; this was the 11th day of October, 1862, when the papers bear date, at the house of Holmes Hendrickson, at the time of judicature referred to in the paper marked "D." Joseph W. Borden and myself were together, and this paper is the original record of the proceedings before myself and Joseph W. Borden, as justices of the peace, in the matter of the seizure of the Ann L. Whitman, upon the complaint of Michael Fay. This paper shown to me, marked Exh. "E," is the complaint in that case.

(The Exh's D & E were then read in evidence.)

52 THE STATE OF NEW JERSEY,
County of Monmouth, ss:

Michael Fay, of the township of Middletown, county of Monmouth, aforesaid, having exhibited an information unto Joseph W. Borden and William C. Irwin, two of the justices in and for said county, as follows:

THE STATE OF NEW JERSEY,
County of Monmouth, ss:

Michael Fay, of the township of Middletown, county of Monmouth, State of New Jersey, who, as well for the collector of the county of Monmouth aforesaid, as for himself, in this behalf prosecuted, comes before Joseph W. Borden and William C. Irwin, two justices of the peace in and the county of Monmouth aforesaid, on the twenty-seventh day September, 1862; and, as well for the county-collector of the county of Monmouth aforesaid, as for himself, gives the said justices to under-

stand and be informed that John Whitman, residing out of the State of New Jersey, and not an actual inhabitant and resident of the State of New Jersey, for six months next proceeding the time, but residing, to wit, in the State of New York, on the twenty-third and on the twenty-sixth day of September, A. D. eighteen hundred and sixty-two, did rake and gather clams, either on said John Whitman's own account and benefit, or on account and benefit of his employers, in the rivers,
53 bays, and waters of the State of New Jersey, to wit, in Raritan Bay, in said county of Monmouth, on board of a certain scow, boat, or vessel, called the "Ann L. Whitman," and then and there put the same in said vessel, against the form of the statute in such case made and provided, and against the seventh section of the act entitled "An act for the preservation of clams and oysters," revision approved April 14, 1846, whereby the said scow, boat, or vessel, together with all the clams, clam-rakes, tongs, tackle, and furniture and apparel in and belonging to the same, become forfeited.

Whereupon the said Michael Fay, who, as well for the said collector of the said county of Monmouth, as for himself in this behalf, prosecutes, prays the advice of the said justices in the premises, and that the said justices appoint a time and place for the trial of the said seizure, and that the said vessel & clams, clam-rakes, tongs, tackle, furniture, and apparel, may be adjudged forfeited and condemned, and the same was then and there, on said twenty-sixth day of September, seized and secured by said Fay; and that the same may be seized, condemned, and disposed of by the order and under the direction of *of* the said justices, and that he, the said Michael Fay, who, as well for the
54 said collector of the county of Monmouth, as for himself in this behalf, prosecutes, may have a moiety of the proceeds of the said sale, after deducting all legal costs and charges, according to the form of the statute in such case made and provided; and also, that the said John Whitman have notice to appear before the said justice at the time and place appointed for the trial of the said seizure, to answer of and upon the premises, the said vessel being, on the twenty-third and on the twenty-sixth day of September aforesaid, in the possession and control of the said John Whitman, employed as aforesaid.

Sept. 27, 1862.

(Signed) MICHAEL FAY.

And whereas the said justices have appointed Monday, the sixth day of October, A. D. eighteen hundred and sixty-two, at the house of Holmes Hendrickson, at Riceville, in the said township of Middletown, county of Monmouth, and State of New Jersey, at ten o'clock a. m., for the trial of said seizure, and having caused notice, in writing, under our hands, to be served upon the said John Whitman, to appear at the said time and place to answer unto and make defence against the said in-
55 formation and proceeding; which notice was served upon the said second day of October, instant, by leaving the same at the place of abode of said John Whitman, on Staten Island, in the State of New York, with a person then residing at the said place of abode, over the age of fourteen years, and informing said person of the contents thereof, as appears to us by the oaths of Edgar C. Primeran and William A. Scott; and at the time and place appointed, the said Michael Fay did appear, and the said John Whitman did not appear before us, the said justices, and we, at the time and place so appointed, did adourn the trial *the trial* and hearing of said information and proceedings (sufficient cause appearing to us therefor) to Saturday, the eleventh day

of October, A. D. eighteen hundred and sixty-two, at the house of Holmes Hendrickson aforesaid, at the hour of ten o'clock a. m.

And now, at the time and place last aforesaid, the said Michael Fay appeared, and the said John Whitman did not appear before us; and it being proved to us by the oath of Joseph J. Thompson that, on the ninth day of October, 1862, the said John Whitman had further notice of said adjournment of the said time and place of said trial and hearing, we, the said justices, proceeded to the trial of the said seizure and
56 proceedings; and William H. Scott, Benjamin T. Tompkins, Russell G. Andrews, Joseph J. Thompson, Jacob Swan, Thomas Johnson, Edward Hooper, Edgar Primerea, and Michael Fay, being sworn by us, and giving their evidence on the part of Michael Fay, and the said Michael Fay have also offered in evidence and produced a copy of the enrolment of said vessel in the collector's office at the port of entry of New York; and we having considered the said evidence, do adjudge that the said information is true, and that the said John Whitman did rake and gather clams either on his own account and benefit, or on account and benefit of his employer, on the times stated in said information, on board of the said boat or vessel called the "Ann L. Whitman," in the waters of Raritan Bay aforesaid, in the county of Monmouth, and State of New Jersey; and that the said John Whitman, at the said times of committing the said offences, was not an actual resident or inhabitant of this State, and had not been for six months next proceeding, an actual inhabitant or resident thereof; and that the said boat or vessel was, on the said twenty-sixth day of September last, while so used and employed, seized and secured by the said Michael Fay; which said offences were contrary to the form of the statute in such case made and
57 provided; and we do therefore determine and further adjudge that the said boat or vessel, with all the clams, clam-rakes, tongs, tackle, furniture, and apparel, be forfeited and condemned, and that the same be sold by our order and under our direction; and, after deducting all legal costs and charges, one-half of the proceeds of said *said* sale be paid to the collector of said county of Monmouth and the other half to the said Michael Fay, who seized and prosecuted the same; which determination and adjudication are made according to the statute in such case made and provided.

In witness whereof we, the said justices, have hereto set our hands and seals this eleventh day of October, A. D. eighteen hundred and sixty-two, at the house of Holmes Hendrickson aforesaid.

JOSEPH W. BORDEN. [L. S.]
W'M C. IRWIN. [L. S.]

Exhibit "E," being the said complaint of Michael Fay, is as set forth in Exh. D, as aforesaid.

The Ann L. Whitman was sold under the decree of confiscation read in evidence made by Joseph W. Borden and myself, as justices of the peace of the county of Monmouth, at the house of Holmes Hen-
58 drickson, at Riceville, township of Middletown, county of Monmouth.

The commissions of William C. Irwin and Joseph W. Borden, as justices of the peace of the county of Monmouth, were then read in evidence:

[VIGNETTE.]

The State of New Jersey to William C. Irwin, esquire, greeting:

Whereas the Secretary of State hath exhibited to me a statement of the result of the election for justices of the peace at the last annual meeting of the township of Middletown, in the county of Monmouth, whereby it appears that you were duly elected by the electors of said township to be one of the justices of the peace in and for said county of Monmouth: You are, therefore, by these presents commissioned one of the justices of the peace of the said State for the county of Monmouth aforesaid; To have and to hold the same, with all powers and jurisdiction, civil and criminal, cognizable before a justice of the peace, severally or jointly with other the justices of the said State in the said county; together with the fees allowed for the exercise of the several duties thereof, agreeably to the Constitution and laws of this State.

In testimony whereof the great seal of the State is hereunto affixed.

59 Witness William A. Newell, governor of the State of New Jersey, at Trenton, the first day of May, in the year of our Lord one thousand eight hundred and fifty-eight, and of the Independence of the United States the eighty-second.

W'M A. NEWELL.

By the governor:
[SEAL.] THO'S S. ALLISON,
Secretary of State.

[VIGNETTE.]

The State of New Jersey to Joseph W. Borden, esquire, greeting:

Whereas the Secretary of State had exhibited to me a statement of the result of the election for justices of the peace at the last annual meeting of the township of Shrewsbury, in the county of Monmouth, whereby it appears that you were duly elected by the electors of said township to be one of the justices of the peace in and for the county of Monmouth: You are, therefore, by these presents commissioned one of the justices of the peace of the said State for the county of Monmouth aforesaid: To have and to hold the same, with all powers and jurisdiction, civil and criminal, cognizable before a justice of the peace,

60 severally or jointly with other the justices of the said State in the said county; together with the fees allowed for the exercise of the several duties thereof, agreeably to the constitution and laws of this State.

In testimony whereof the great seal of the State is hereunto affixed.

Witness Charles S. Olden, governor of the State of New Jersey, at Trenton, the first day of May, in the year one thousand eight hundred and sixty, and of the Independence of the United States the eighty-fourth.

CHA'S S. OLDEN.

By the governor:
[SEAL.] THO'S S. ALLISON,
Secretary of State.

A transcript of said Exhibits D & E was then read in evidence, marked K, and certified to as follows:

COUNTY OF MONMOUTH,
State of New Jersey, ss:

We, the undersigned, each for himself, does hereby certify that the foregoing transcript is in all respects correct, and that we had jurisdiction of the said cause therein referred and set forth.

Witness our respective hands and seals this twenty-eighth day of January, eighteen hundred and sixty-four.

JOSEPH W. BORDEN. [L. S.]
WM C. IRWIN. [L. S.]

[U. S. int.-rev., 25 cts., cancelled.]

61 STATE OF NEW JERSEY,
County of Monmouth, ss:

I hereby certify that the persons who subscribed the within transcript was, at the date of such judgment, justices of the peace of the county of Monmouth, and that the signatures thereto are in their own proper handwriting.

Witness my hand and the seal of the court of common pleas of the said county of Monmouth, at Freehold, in the county of Monmouth, and State of New Jersey, the 28th day of January, in the year eighteen hundred sixty-four.

[SEAL.] HOLMES W. MURPHY,
Clerk of the said County of Monmouth and of the Inferior Court of Common Pleas of said County.

[10-ct. rev. stamp, cancelled.]

ROBERT ALLEN, being duly sworn for the defendant, testified:

I reside in Monmouth County. I am an attorney and counsellor at law of the New Jersey bar. I am familiar with the jurisdiction of justices of the peace of the State of New Jersey. These justices have no seal of their court but the wafer, which they use themselves. Records are all authenticated by a sworn copy or the original. They have no clerk. Exh. D, now shown me, is in my handwriting.

62 It was drawn in the presence of the two justices of the peace who signed it, Oct. 11, 1862. The complaint, Exh. E, shown me, is also in my handwriting. The New Jersey court, for the trial of "small causes," is held by one justice of the peace alone. The term "small causes" is a special term applicable to a special class of cases. The coast-charts, showing these waters, made by the U. S. Coast Survey, was read in evidence, to be used by either party.

The defendants' counsel then read in evidence—

1st. An act of the legislature of the State of New Jersey, passed Ap'l 14, 1846, entitled "An act for the preservation of clams and oysters," and the supplements thereto; which said acts and supplements are set forth in the said plea of the said defendant herein. (See Nixon's Digest, M., p. 109.)

2nd. The constitution of the State of New Jersey. (Nixon's Digest, p. 9, XX.)

3rd. An act of the province of New Jersey for dividing and ascertaining the boundaries of all the counties therein, passed Jan'y 21st, 1709, and supplements thereto, passed Nov. 28, 1822. (Nixon's Digest, M., p. 147, 148.)

4th. An act of the province of New Jersey establishing the boundaries and partition line between the colonies of New York and New Jersey, passed 1772. (1 Nixon's Dig., M., p. 818.)

63 5th. An act for the settlement of the territorial limits and jurisdiction between the States of New Jersey and New York, passed February 6th, 1833. (Nixon's Dig., M., p. 822.)

6th. An act to ratify and confirm an agreement made between the commissioners appointed by the governor of the State of New York and commissioners appointed by the governor of the State of New Jersey, respecting the territorial limits and jurisdiction between the said States, passed Feb'y 26, 1834. (Nixon's Dig., M., p. 823.)

7th. A similar act, passed by the legislature of the State of New York, Feb'y 5th, 1834. (Rev. Statutes, vol. 1, M., p. 65.)

8th. An act of Congress approving the same, passed June 28th, 1834. (Statutes at Large, vol. , p .)

9th. The Monmouth patent, dated Ap'l 8th, 1665. (Leaming and Spicer, p. 166.)

10th. An act, passed by the legislature of the State of New Jersey, to establish and regulate pilots, approved April 17th, 1846, and the supplements thereto, establishing Sandy Hook as a harbor. (Nixon's Dig., p. 591.)

11th. An act, passed by the legislature of the State of New York, to establish regulations for the port of New York. (Session Laws, 1857, vol. 2, p. 487.)

64 An act of the legislature of the State of New Jersey constituting courts for the trial of "small causes," approved Ap. 16, 1846. (Nixon's Dig., p. 390.)

13th. The pilot laws of New York as appears in the Session Laws.

14th. A report of the commissioners relative to encroachments, appointed by the legislature of the State of New York, under the act of March 30, 1855, submitted in the senate of the State of New York, Jan'y 29, 1857.

15th. The grant of the Duke of Netherlands to the Duke of York, dated March 12th, 1664. (Leaming and Spicer, p. 3.)

16th. The commission from Berkley to Carteret, dated Feb'y 10, 1664. (Leaming and Spicer, p. 26.)

17th. Instructions from Berkley to Carteret, dated Feb. 10, 1664. (Leaming and Spicer, p. 28.)

18th. Grant to the Duke of York, dated June 29, 1674. (Leaming and Spicer, p. 41.)

19th. Instructions to the proprietors. (Leaming and Spicer, p. 50.)

20th. Deed of surrender of the proprietors to Queen Anne. (Leaming and Spicer, p. 509.)

The plaintiffs counsel then read in evidence—

1st. Grant of New Netherlands from Charles 1st to Duke of York, dated March 12, 1664.

65 2nd. Declaration of New York of her boundaries, dated March 12, 1664, in Holland Documents, vol. 2, p. 295.

3rd. Treaty between New York and New Jersey, above referred to.

Whereupon the said counsel for the said defendant did then and there insist before the said circuit judge, on behalf of the said defendant, that the said several matters so produced and given in evidence as aforesaid on behalf of the said defendant were sufficient and ought to be admit'ed and allowed as decisive evidence to entitle the said defendant to a verdict and to bar the said plaintiff of his action aforesaid; and the said counsel for the said defendant did then and there pray the said circuit judge to admit and allow the said matters so produced and given in evidence in favor of the said defendant to be conclusive evidence in

favor of the said defendant, and to entitle him to a verdict in this cause, and to bar the said plaintiff of his action aforesaid. But to this the said counsel for the said plaintiff did then and there object and insist before the said circuit judge, that the same were not sufficient nor ought to be admitted or allowed to entitle the said defendant to a verdict, or to bar the said plaintiff of his action aforesaid. And the said circuit judge did
66 then and there declare and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said defendant, were not sufficient to bar the said plaintiff of his action aforesaid. Whereupon, the said counsel for the said defendant, did then and there, on behalf of the said defendant, except to the aforesaid opinion of the said circuit judge, and insist on the said several matters as an absolute bar to the said action.

And the said circuit judge did then and there further declare and deliver his opinion to the said jury, and did charge the said jury as follows:

GENTLEMEN OF THE JURY: This protracted trial, to which you have given your unflag'ing attention for two weeks, is now near its close. You have carefully attended to the evidence and to the elaborate arguments of counsel, and it only remains for the court to submit some instructions, which I trust will simplify your remaining duties in the case and aid you in disposing of the few simple facts upon which you have to pass.

The action is one of trespass, to recover damages alleged to have been committed upon the person and property of the plaintiff, by forcibly depriving him of his sloop, Ann L. Whitman, of which he was mas-
67 ter and owner, on the 26th day of September, 1862. The defendant admits the seizure of the vessel, but denies that any force was used beyond what was necessary and proper to effect that object. He also denies that any violence was offered to the person of the plaintiff. The defendant further alleges that the seizure was made under and by virtue of a statute of the State of New Jersey, by him, acting as sheriff of the county of Monmouth, in that State, on the ground that the plaintiff was engaged with his vessel in taking clams from the waters of the State and within the limits of the county. He justifies the seizure on the ground that he was a public officer bound to execute the law of his State.

The first question to be determined in this part of the case is, what are the boundaries of the States of New York and New Jersey in the vicinity of this alleged trespass. The seizure took place on the waters lying between the south side of Staten Island and the shore of New Jersey, westerly of a north and south line drawn from the west point of Coney Island to the point of Sandy Hook. The boundaries of these two
68 States in these waters are fixed and defined by a treaty or compact entered into by them through a joint commission duly appointed for that purpose. This compact was ratified by the Congress of the United States and approved June 28, 1834. The first article of this treaty is in these words: The boundary line between the States of New York and New Jersey from a point in the middle of Hudson River, opposite the point of the western shore thereof, in the 41st degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river of the bay of New York, of the waters between Staten Island and New Jersey and of Raritan Bay to the main sea, except as hereinafter otherwise particularly mentioned.

The exception afterwards made in the treaty do not effect the question now before us and therefore need not be noticed here. This article which I have read defines the entire boundary between the two States

from the starting point in the middle of the Hudson River down through all the waters separating the land of the State to the "main sea." This boundary-line is declared in ample and unmistak'able language to be the middle of all those waters; it matters not by what name they are called. The whole chain of waters from the starting point to
69 the main sea is divided in the middle and this central line fixes the territorial limits of the two States respectively. The eastern and northern limit of New Jersey and the western and southern limit of New York meet and terminate at this line in the middle of these waters throughout its entire length to the main sea. You see at once, gentlemen, that the only question in dispute between the parties in this part of the case is as to the eastern or lower terminus of this line. It is agreed that it terminates at the "main sea," and the solution of the question depends upon the interpretation to be given to these two words. The duty of determining the meaning of these words has been submitted to the court by the counsel on both sides as a question of law for the court to determine. I therefore charge you, gentlemen, that the words "main sea," as used in the treaty, are synonymous with ocean, and therefore that, by the terms of the compact, these States have concurred, with the assent of the United States, in fixing their respective boundaries at the middle of the bay or waters between Staten Island and the New Jersey shore as far east as Sandy Hook, where
70 the bay terminates in the main sea or ocean. This is the natural and rational construction of this treaty when applied to the subject-matter to which it relates. It is hardly to be supposed that these enlightened States when entering into a formal and solemn treaty in order to fix their respective boundaries should leave a considerable and important portion of them wholly undefined. The construction insisted on by the plaintiff's counsel is that the words "main sea" are to be understood as referring to the waters outside of or beyond what is called in the books fauces terræ, that is, the jaws of the land, were so near each other that persons can be clearly distingnished with naked eye from one shore to the other. But such an interpretation would be inconsistant with the language of the treaty itself. It is conceeded that the most eastern points on the respective shores where this test of distinguishing persons clearly from one to the other could be applied, cannot be further east than Princess Bay lights and Mataran Creek, and yet the boundary line designated in the treaty extends east of a line drawn from shore to shore at these points, for it speaks of conferring exclusive jurisdiction upon New Jersey over the west end of the bay of "that part of Raritan Bay lying west of a line drawn
71 from the light-house at Princess Bay to the mouth of the Mataran Creek.' The treaty itself thus recognizes Raritan Bay as extending east of this line, and yet it divides the waters of this entire bay to the main sea. It is clear, therefore, that as the treaty extends the boundary line east through Raritan Bay beyond the fauces terræ, it could not have regarded the latter as fixing the place where the bay ends and the main sea begins. There is nothing in the configuration of the bay itself that suggests its terminus short of the main ocean, or at least short of the main ship-channel which passes on the east side of Staten Island southerly round the Southwest Spit and easterly by Sandy Hook Point. There is no description of the bay in the treaty or in the evidence which suggests a line west of this where the bay ends and the main sea begins. No one would attempt, upon the evidence before the court, to draw a line from Staten Island to the New Jersey shore and say the waters west of that line are Raritan Bay and east of the

same the "main sea." The descriptive terms Raritan Bay and main sea are evidently used in this treaty as designating two distinct bodies of water, and as the fauces terræ are disregarded by the whole
72 tenor of this part of the instrument when read in the light of the facts touching the width of the bay, the conclusion is irresistable that the term "Raritan Bay" refers to the body of water embosomed within the shores of the two States, and that of the main sea to the ocean lying outside. The reason for extending the boundary line as far east as the great ship-channel which passes southerly on the east of Staten Island and out to sea by Sandy Hook Point, would seem to be as numerous and cogent as those for defining it in the other parts of these waters; such an division was entirely consistent with the dignity of these States and of the United States and within the power of the contracting parties. The freedom of navigation is carefully preserved over all these waters; for that purpose they are all free, and neither New York nor New Jersey has any exclusive right therein. The latter States have simply, and, as I think, with great wisdom fixed a line which shall mark their territorial boundaries and the limits of their respective jurisdictions.

This line, as I have already stated, the treaty extends through the middle of these waters to the ocean, or at least to the great ship-channel which passes from New York Bay, east of Staten Island, by Sandy Hook, to the sea or ocean. It is sufficient for the purpose of this
73 case that we follow the boundary line as far east as that channel. This, then, is the boundary fixed by the treaty, and you will, gentlemen, take it as your guide in this part of the case. Of course all that part of these waters that lie south of this line are within the territorial limits of New Jersey. The next question to be determined is that of the northern boundary of Monmouth County; and I cannot better define that than by using the statute of New Jersey: "The northern bounds of the county of Monmouth are declared to be the middle or midway of the waters of Raritan Bay, from the line of Middlesex to the main channel which passes by Sandy Hook, and along the said channel to the sea." Under this definition of the boundaries of the State of New Jersey and the county of Monmouth the jury are to find from the evidence two facts:

First: Was the seizure of the Ann L. Whitman, by the defendant, made within the limits of New Jersey?

Second. Was it made within the limits of the county of Monmouth?

After all the evidence which has accumulated on the point as to where the seizure was actually made, it is hardly necessary for me to rehearse it to you. The plaintiff himself has testified that, in his judgment,
74 he was, at the time of the seizure, a little south of the middle of the bay, or, to use his own language, "Not much difference in distance from the New Jersey shore and Staten Island, but nigher, if anything, to the Jersey shore." The counsel for the plaintiff has called your attention to the testimony of the two witnesses on the said boat, who say they took the bearings of the place of seizure with the compass. On the other hand a large number of witnesses have been on behalf of the defendant, some of whom were on shore, who swear distinctly that they saw the seizure and noted the place; and it is difficult to see how those who stood on shore and took the range from one shore to the other could be mistaken. It was forcibly remarked on the argument, and I believe by one of the witnesses, that there might be difficulty in fixing the exact location when the spectator was out on the water and standing on a moving object. But this criticism does not

apply to those who stood upon land and could see the shore upon the opposite side. The location of objects like this vessel under sail, with the tug in her neighborhood, certainly ought not to be attended with any difficulty. The jury must recollect the main features of the evi-
dence on this point; and it is for them to say, after dispassion-
75 ately weighing the whole evidence, whether this seizure took place within the territorial limits of the county of Monmouth and State of New Jersey. I think they can. They can have no difficulty in coming to a conclusion. There is another fact upon which I desire the jury to pass upon, inasmuch as it is in the evidence; though I intimated to the counsel upon both sides at an early stage of the trial that I did not deem the fact material in the controversy now before the court. But it seems to have been made the subject of inquiry, doubtless out of abundant caution. This fact is, was the plaintiff engaged, that day—the 26th September, 1862—in taking clams within the limits of the county of Monmouth, in the State of New Jersey. On the fact of taking clams somewhere that day, though the plaintiff is quite positive none were taken, yet Garret and Perine, the two young men who were with the plaintiff, say that a few were taken, and but a few—the number is not material. Garret says that they commenced fishing between 10 & 11 o'clock. Perine says they may have fished a couple of hours, and that, at the time of seizure his pants were wet from fishing, and on that account he went into the cabin and changed them.

Now, gentlemen, you have heard the evidence touching the place
76 w'ere the rakes were thrown overboard, and the fishing done, and the condition of the clams on top of the pile on deck when the vessel was taken, and it is for you to say whether the clams were taken that day by the plaintiff, and whether this was done within the limits of the county and State. The record offered by the defendant in justification of the proceedings before the justices of the peace, condemning the vessel, finds the fact that the plaintiff was engaged that day in taking clams from the waters of the county of Monmouth, and State of New Jersey, and that finding in the record is prima facie evidence of the fact itself. and throws upon the plaintiff the burden of proof on this point. If he has failed to satisfy you to the contrary, then it will be your duty to find this fact in the affirmative.

You will, after finding the special facts which I have submitted to you, render a verdict for the plaintiff. The remaining questions of law which have been discussed will then be determined by the court.

The only remaining question for you to consider is that of damages. The rule which must guide you in this point is the actual damages suffered by the plaintiff in the loss of his property and being taken to New
Jersey and detained over night. The particular manner of the
77 seizure, whether *whether* it was gentle and with no more force than was necessary to accomplish the object, or whether it was done rudely and with violence need not be subject of inquiry. The manner of the seizure, either as a ground of recovery or as an element of damages, is not involved in the case as it stands before us, and the said circuit judge thereupon directed the said jury to answer the following questions, viz:

First. Was the seizure of the Ann L. Whitman made by the defendant within the limits of New Jersey?

Second. Was it made within the limits of the county of Monmouth?

Third. Was the plaintiff engaged that day, the 26th September, 1862, in taking clams within the limits of county of Monmouth, New Jersey?

Fourth. What amount of damages did the plaintiff sustain?

And the said circuit judge did, in his said opinion and char ge to th

said jury, declare and deliver his opinion to the said jury that the record offered by the defendant in justification of the proceedings before the justices of the peace condemning the said vessel finds the facts that
78 the plaintiff was engaged that day in taking clams from the waters of the county of Monmouth, in the State of New Jersey, and that finding in the record is prima facie evidence of the fact itself, and throws upon the plaintiff the burden of the proof on this point. To which said last-mentioned opinion of the said circuit judge, the said counsel for the said defendant did then and there, on behalf of the said defendant, except; which exception was thereupon duly noted.

The said counsel for the said defendant did then and there request the said circuit judge to charge the said jury:

First. That the record of the said justices of the peace, was conclusive against the plaintiff in said action as to all the facts passed upon by the said justices appearing in said record.

The said circuit judge refused so to charge; to which refusal the said counsel for the said defendant did then and there, on the behalf of the said defendant, except; which exception was thereupon duly noted.

The said counsel for the said defendant did then and there further request the said circuit judge to charge the jury: That the said record is conclusive against the plaintiff in this action as to all the facts therein
79 contained, excepting as to the question of jurisdiction, and that the jury should not regard the oral testimony given by the plaintiff, so far as it extends to impeach the findings contained in the said record excepting as to the question of jurisdiction.

The said circuit judge refused so to charge; to which refusal the said counsel for the said defendant did then and there, on the behalf of the said defendant, except; which exception was thereupon duly noted.

The said counsel for the said defendant did then and there further request the said circuit judge to charge the said jury: That the said record of the said justices is conclusive against the said plaintiff in this action, and that he has no right to review in this action the finding of the said justices as contained in said record.

The said circuit judge refused so to charge; to which refusal the said counsel for the said defendant did then and there, on the behalf of the said defendant, except; which exception was thereupon duly noted.

The said counsel for the said defendant did then and there further request the said circuit judge to charge the jury: That the oral testi-
80 mony produced by the said plaintiff in this action, so far as it conflicts with the findings of said justices in said record, was immaterial, and should not be regarded by the jury in rendering their verdict.

The said circuit judge, refused so to charge; to which refusal the said counsel for the said defendant did then and there, on behalf of the said defendant, except; which exception was thereupon duly noted.

And the said circuit judge, under the charge and with the directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid, to the said jury; and the jury aforesaid, after being out considerable time returned, and the foreman stated that they found for the plaintiff $3,500. The said circuit judge then enquired what they found as to the first question submitted.

The foreman answered that they found the seizure to be south of the line.

The said circuit judge then put the second question to them.

The foreman answered they would like to know what the limits of the said county were. They found that the seizure was in the channel.

The said circuit judge then put to them again that portion of his

charge which stated the limits of the county of Monmouth, and sent them out again.

The jury then returned and gave the following verdict.

81 First. Was the seizure of the Ann L. Whitman, made by the defendant within the limits of New Jersey?

The jury answered. Yes.

Second. Was it made within the limits of Monmouth County?

The jury answered. No.

Third. Was the plaintiff engaged that day, the 26th September, 1862, in taking clams within the limits of the county of Monmouth, in New Jersey?

The jury answered. No; and they further say that they assess the damages in favor of the plaintiff at $3,500[0.]

And inasmuch as the said several matters so produced, and given in evidence on the part of the said defendant; and, by his counsel aforesaid objected and insisted on as a bar to the said action aforesaid do not appear by the record of the verdict aforesaid, the said counsel for the said defendant, did then and there propose his aforesaid exceptions to the opinion of the said circuit judge, and request him to put his seal to this bill of exceptions containing the said several matters so

82 produced and given in evidence on the part of the said defendant as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said circuit judge, at the request of the said counsel for the said defendant, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provired, on the 25th day of January, 1864. This bill agreed upon by attornies.

S. NELSON. [L. S.]

83 At a stated term of the circuit court of the United States for the southern district of the State of New York, held in said district, at the city of New York, in the court-rooms of said court, on the third Monday of October, in the year one thousand eight hundred and sixty-eight—

Present, Hon. Samuel Nelson, justice.

JOHN WHITMAN
against.
JOSEPH J. THOMPSON.

This cause having heretofore been tried before a jury, and a verdict having been rendered upon said trial, in favor of the plaintiff, and against the defendant, for the sum of three thousand five hundred dollars, and the entry of judgment thereon having been stayed, pending the hearing and decision upon a bill of exceptions, taken by the defendant upon the said trial of the issues herein; and the said defendant, by his attorney, having brought into this court the said bill of exceptions, and all and singular the premises being seen and by the court here fully understood, and after hearing C. N. Black, esq., counsel for the

84 said defendant, and C. A. Rapallo, esq., of counsel for the said plaintiff, and mature deliberation being thereupon had, and it appearing to the said court now here, that the verdict aforesaid is in all respects good, and valid in law, anything in the said bill of exceptions contained to the contrary thereof in any wise notwithstanding.

It is therefore ordered, upon the motion of C. A. Rapallo, esq., counsel for said plaintiff, that judgment be entered herein in favor of the said plaintiff, and against the said defendant, for the aforesaid amount of the said verdict, with costs.

S. NELSON.

85 Whereupon all and singular, the premises being seen and by the court here fully understood, and mature deliberation being thereupon had, it appears to the said court now here that the verdict aforesaid of the juries aforesaid, in form aforesaid given, is in all respects good and valid in the law, anything in the said bill of exceptions contained to the contrary thereof in any-wise notwithstanding.

Therefore, it is considered that the said plaintiff do recover against the said defendant his said dam'ges by the jurors aforesaid, in form aforesaid assessed; and also the further sum of two thousand two hundred and twenty-one dollars and fifty-one cents for his said costs and charges by the said court now here adjudged of increase to the said plaintiff, and with his assent; which said damages, costs, and charges in the whole amount to five thousand seven hundred and twenty-one dollars and fifty-one cents.

And the said defendant, in mercy, &c.

Judgment signed this 24th December, 1870.

R. E. STILWELL,
Dep. Clerk.

86 (Endorsed:) Whitman vs. Thompson. Filed Dec. 24, 1870.

87 (Indorsed:) U. S. circuit court. John Whitman ag'st Joseph J. Thompson. Bill of exceptions. Cha's N. Black, for def't. Approved. N. Y., May 30, '71. C. A. Rapallo, pl'ffs att'y.

88 Supreme Court of the United States.

JOSEPH J. THOMPSON
vs.
JOHN WHITMAN. } In error.

Of December term in the year of our Lord one thousand eight hundred & seventy-one.

Afterwards, to wit, on the first Monday in December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Joseph J. Thompson by Charles N. Black, his attorney, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit: That, the declaration aforesaid and the matter therein contained are not sufficient in law for the said John Whitman to have or maintain his aforesaid action thereof against the said Joseph J. Thompson. There is also error in this, to wit: That, by the record aforesaid it appears that the judgment aforesaid given, was given for the said John Whitman against the said Joseph J. Thompson, whereas, by the law of the land the said judgment ought to have been given for the said Joseph J. Thompson, against the said John Whitman; and the said Joseph J. Thompson prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

89 CHA'S N. BLACK,
Attorney for Pl'ff in Error.

(Endorsed:) Supreme Court of the United States. Joseph J. Thompson vs. John Whitman. Assignment of error. Chas. N. Black, att'y for pl'ff in error.

We admit service of a within copy of assignment & error.
Dated Oct. 17, 1871.

BEACH, DALY & BROWN,
Atty's for Def't.

Filed Oct. 19, 1871.

90 Supreme Court of the United States.

JOSEPH J. THOMPSON
vs.
JOHN WHITMAN. } In error.

And afterwards, to wit, on the first Monday of December, in December term, in the year of our Lord one thousand eight hundred and seventy-one, the said John Whitman by Beach, Daly & Brown, his attorneys, freely comes here into court and says that there is no error either in the proceedings or record aforesaid, or in the giving of the judgment aforesaid, and he prays that the said Supreme Court of judicature before the justices thereof now here, may proceed to examine as well the records and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all things affirmed, &c.

BEACH, DALY & BROWN,
Attorneys for Defendant in Error.

(Endorsed:) U. S. Supreme Court. Joseph J. Thompson vs. John Whitman. Joinder in error. Beach, Daly & Brown, attorneys for def't in error. 27 Chambers street, N. Y. Filed Oct. 19, 1871.

91 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

JOHN WHITMAN
ads.
JOSEPH J. THOMPSON

Know all men by these presents that we, John W. Stout, of No. 91 Barclay street, and J. T. Potter, of No. 89 Barclay street, in the city of New York, are held and firmly bound unto the above-named John Whitman, in the sum of twelve thousand dollars, to be paid to the said John Whitman; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 30th day of December, in the year of our Lord one thousand eight hundred and seventy.

Whereas, the above-named Joseph J. Thompson has prosecuted his writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Joseph J. Thompson shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN W. STOUT. [L. S.]
J. T. POTTER. [L. S.]

Sealed and delivered, and taken and acknowledged this 31 day of Dec'r, 1870, before me.

R. E. STILWELL,
U. S. Com'r.

92 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John W. Stout and J. T. Potter, being duly sworn, deposes and says, each for himself, that he is worth the sum of twelve thousand dollars, over and above all his just debts and liabilities.

JOHN W. STOUT.
J. T. POTTER.

Sworn to this thirty-first day of December, A. D. 1870, before me.

R. E. STILWELL,
U. S. Com'r.

(Indorsed:) Vol. Page. U. S. circuit court. John Whitman, def't in error, ads. Joseph J. Thompson, pl'ff in error. Bond for costs on filing writ error. Cha's N. Black, att'y for def't. Filed this day of 18 .

Approved Dec'r 31, 1870.

SAM'L BLATCHFORD,
District Judge.

93 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, to John Whitman, esquire:

Whereas there was lately issued out of the said circuit court of the United States, a writ of error directed to the judge of the said circuit court of the United States for the southern district of New York, stating that, in the records and proceedings, as also in the rendition of a plea in the said circuit court before the judge thereof, between John Whitman, plaintiff, and Joseph J. Thompson, defendant, a manifest error hath happened to the great damage of the said Joseph J. Thompson;

And whereas, for the correction of that error in due manner,
94 the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be held at the city of Washington, on the first Monday of December next:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the second circuit the thirty-first day of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninty-fourth.

SAM'L BLATCHFORD,
District Judge.

95 (Indorsed:) U. S. cir. court. John Whitman, def't in error, ads. Joseph J. Thompson, pl'ff in error. Citation. Cha's N. Black, att'y for def't & pl'ff in error. Filed Jan'y 3, 1871.

I admit due service of a copy of the within citation. Dated Dec'r 31, 1871.

C. A. RAPALLO, *Pl'ffs Att'y.*

(Indorsement on cover:) No. 570. Joseph J. Thompson, plaintiff in error, vs. John Whitman. S. New York. C. C. U. S. Filed 28th December, 1871.

United States Supreme Court.

JOSEPH J. THOMPSON,
vs.
JOHN WHITMAN.
In Error.

ADDITIONAL BRIEF

FOR

PLAINTIFF IN ERROR,

BY

R. GILCHRIST.

JERSEY CITY:
PRINTED BY JOHN H. LYON.
1873.

Supreme Court of the United States.

JOSEPH J. THOMPSON, *vs.* JOHN WHITMAN,	*In Error to Circuit Court of the United States for the Southern District of New York.*

BRIEF FOR PLAINTIFF IN ERROR.

ABSTRACT OF THE CASE.

The plaintiff in error, as sheriff of a county of the State of New Jersey and as a citizen thereof, with many other citizens, seized the vessel of the defendant in error, on the 26th day of September, 1862, in the waters of New Jersey.

(*Record, pages* 14 [40], 29 [81]).

Michael Fay, one of the said citizens of New Jersey who accompanied the sheriff, laid before justices of the County of Monmouth, on the next day, an information of the seizure, alleging among other things that the defendant in error, residing out of the State of New Jersey and not an actual inhabitant of the State for six months preceeding, on the 23d and 26th days of September, 1862, did rake and gather clams in the waters of New Jersey on board of said vessel, and that thereby the said vessel was forfeited, and that she was seized in the County of Monmouth.

(*Record, pages* 18 *and* 19).

A statute of New Jersey made it unlawful for a non-resident to rake clams, and enacted that the vessel should be forfeited, that all sheriffs should seize and secure, and all citizens might seize and secure such vessel, and that it should be proceeded against before justices of the peace of the *county* where the seizure was made; be condemned and sold.

(*Record, page* 2 [1]).

Such proceeding were had thereon, that the vessel on the 11th day of October, in the year 1862, was adjudged forfeited and ordered to be sold under the direction of said justices.

The defendant in error brought his suit in the Supreme Court of New York on the 11th day of October, A. D. 1862, and it was subsequently removed, by the plaintiff in error, to the Circuit Court of the United States.

The vessel was, under the direction of the justices, sold on the 25th day of October, 1862, after the suit brought against the sheriff, but it does not appear by whom. There is no evidence that the sheriff took any part except to seize and secure the vessel.

(*Record, pages* 6 [16], 20 [57, 58]).

The sheriff alone was sued, and pleaded the general issue and a special plea.

The first question involved, raised by the pleadings on the record, is whether the special plea did not tender, or if that were ambiguous, the replication did not treat it as tendering, and distinctly accept the issue, whether the clams were raked by the defendant in error in New Jersey waters —and not the mere issue whether they were raked in Monmouth County, New Jersey—although that was put in issue also.

A second question involved and raised on the pleadings is, whether the issue of a raking of claims in New Jersey waters simply, irrespective of the county, was not a material issue.

The declaration was for taking the vessel of the defendant in error, "On the high seas," and within the Southern

District of New York, and converting her, and for assault and battery and imprisonment.

The Sheriff's special plea sets up:

1st. The statute of New Jersey which enacts among other things as follows: "That it

§ 7. It shall not be lawful for any person who is not at the time an actual inhabitant and resident of this state, and who has not been for six months next preceding an actual inhabitant or resident as aforesaid, to rake or gather clams, oysters or shell-fish, either on his own account and benefit or on account and benefit of his employer, in any of the rivers, bays, or waters of this state, on board of any canoe, flat, scow, boat or other vessel; and every person who shall offend therein shall ferfeit and pay twenty dollars, to be recovered and applied in the manner directed by the first section of this act; and the said canoe, flat, scow, boat or other vessel, used and employed in the commission of such offence, with all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel, shall be forfeited, and the same seized, secured, and disposed of, in the manner prescribed in the ninth and tenth sections of this act.

§ 9. It shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons, to seize and secure any such canoe, flat, scow, boat, or other vessel as aforesaid, and immediately thereupon give information thereof to two justices of the peace of the county where such seizure shall have been made, who are hereby empowered and required to meet at such time and place as they shall appoint for the trial thereof, and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offence shall have been committed, and the other half to the person who shall have seized and prosecuted the same.

2d. That the plaintiff in error was sheriff of the county of Monmouth, in New Jersey.

3d. That at or about the time when, &c., the defendant in error, "Was on the waters of Raritan bay, in New "Jersey, *to wit*, in that part of Raritan bay, westward of "the middle thereof, within the county of Monmouth, and "in the cove between Sandy Hook and the main shore of "said Monmouth county, about midway between Sandy "Hook and the bay shore." * * * "with dredges," &c. "engaged on board of said vessel in raking and "gathering clams, and putting the same on board of said "vessel. * * * And then and there using and employing "said vessel, dredges, &c., and other implements for that "purpose, contrary," &c.

(*See Record, page* 6, [14]).

4th. That defendant in error was not an actual inhabitant or resident of New Jersey, and had not been for six months preceeding.

5th. That plaintiff in error, there, within the waters of New Jersey, and within the boundaries of the county of Monmouth, seized and secured the vessel for such offence.

6th. That he gave information to two justices of the county of Monmouth.

7th. That the vessel was condemned and ordered to be sold by the order and under the direction of the said justices, and was sold on October 25th, 1862.

8th. That the seizure and taking away of the vessel were made and done only with such force and assistance as were necessary to get lawful possession of the same, and no more.

9th. That all allegations in the declaration of assault battery, and false imprisonment, taking and *converting* property of the plaintiff by the defendant, and in that behalf, are false and untrue.

10th. That if the damage was doue, then it was occasioned by a lawful seizure of the vessel, and that the seizure and necessary acts were the trespasses complained of.

11th. The "seizure and the necessary acts connected "therewith were made and done in the State of New Jer- "sey, as aforesaid, for the reason aforesaid, *and not* in the "State of New York, as stated in plaintiff's declaration."

The replication is a reply to the 3d and 11th allegations of the plea, and traverses every one of the particulars set forth in the 3d allegation, but (as the plaintiff in error will insist) traverses only the seizure in *New Jersey*, stated in the 11th allegation of the plea, but does not notice the allegation of seizure in Monmouth county contained in the 5th allegation of the plea.

The condemnation alleged in the 7th allegation is not denied.

The replication is (omitting the formal parts) as follows:

1st. That at the time or times in the declaration mentioned, or at the time or times in the plea alleged, the defendant in error was not on board of the vessel in the place mentioned

2nd. "Nor was said vessel in the waters of Raritan bay"

3d. "Or within the State of New Jersey"

4th. "Or within that part of said Raritan bay westerly "of the middle thereof"

5th. "Or within the boundaries of the County of Mon- "mouth, in said State of New Jersey"

6th. "Or within the cove between Sandy Hook and the "main shore of Monmouth County"

7th. Engaged, nor was said vessel engaged in raking or gathering clams or putting the same on board, nor was he then or *there* using or employing said vessel, dredges, &c., for that purpose.

8th. "And the plaintiff avers that the said sloop, boats, "and other property were not seized and condemned, or "sold according to the law of the State of New Jersey in

"manner and form as alleged in said plea, *but* were seized "and taken by the defendant on the high seas, without au- "thority of law, and without the territorial jurisdiction of "any State, to wit: within the Southern District of New "York, as alleged in said declaration."

A third question involved, raised by the pleadings, is whether the only issue of *fact* upon which the owner put the invalidity of the decree of condemnation was not whether the *seizure* was in *New Jersey* simply, irrespective of any County.

A fourth question involved and raised on the pleadings in connection with the bill of exceptions, is whether if the seizure was in New Jersey simply, within or without a County, though the condemnation and sale were invalid, the sheriff would not have been entitled to judgment below on the verdict that the seizure was in New Jersey, if the issue on the raking in New Jersey simply had been passed upon and found for the sheriff.

The court thought it best not to leave the issues to the jury, but to submit to them instead three questions which were supposed to be equivalent to the issues, and which being answered in the affirmative or negative, could be put into form as a verdict on the issues themselves.

A fifth question involved and raised on the record and bill of exceptions is whether assuming one of the issues on the record to be whether the defendant in error raked clams in New Jersey, within or without any county, the verdict must not, by reason of its being in substance as well as in form, confined to three facts, and by reason of the circumstances under which it was rendered, and the distinct directions of the judge—be considered as simply finding the three facts and none other.

A part of the instruction of the court to the jury was as follows:

"You will, after finding the special facts which I have "submitted to you, render a verdict for the plaintiff. The "remaining" [resulting] "questions of law which have been

" discussed, will then be determined by the court. The only " remaining question for you to consider is that of dam- " ages."

The three questions were:

First—Was the seizure of the Ann L. Whitman made by the defendant *within the limits of New Jersey?*

Second—Was it made within the limits of the *County* of Monmouth?

Third—Was the plaintiff engaged that day, the 26th September, 1862, in taking clams within the limits of the *County* of Monmouth, New Jersey?

(*Record, pages* 26 *and* 27.)

The court also directed the jury to find the amount of damages sustained by the plaintiff.

The jury returned into court and simply said they found for the plaintiff $3,500.

(*Record, pages* 28 *and* 29).

But the court would not receive the verdict, and sent them out again, and they then gave the following verdict:

" *First*—Was the *seizure* of the Ann L. Whitman made " by the defendant within the limits of New Jersey?

" The jury answered Yes.

" *Second*—Was it made within the limits of Monmouth " County?

" The jury answered No.

" *Third*—Was the plaintiff engaged that day, the 26th " September, 1862, in taking clams within the County of " Monmouth, New Jersey?

" The jury answered no, and they further say they assess " the damages in favor of the plaintiff at $3,500."

This appears by the bill of exceptions.

(*Record, page* 29.)

And the record itself shows no other formal or substantial finding on the issues other than the above; and the whole verdict is entered on the record itself, in the very words above stated, except, the record states the verdict by incorporating the question in the answer.

(*Record, page* 14.)

After this verdict there seems to have been an argument in the nature of a motion in arrest of judgment, or on the verdict as a special one.

(*Record, page* 29, [84].)

A sixth question involved and raised on the record, is whether the clear and purposed omission of the jury to find any verdict on the issue whether the defendant in error raked clams in New Jersey, within or without any county, does not render the verdict so defective that the judgment ought to have been arrested below, and ought now to be reversed and *a venire de novo* awarded.

The decree of condemnation and order of sale were offered in evidence and admitted by the judge, but due effect (as is insisted) was not given to it. To show how the questions on the decree of condemnation arose, it will be necessary to state it and some facts appearing in the bill of exceptions.

It appears that about six days prior to the seizure of the vessel, the Governor of New Jersey had been applied to by citizens complaining of the dredging of clams in New Jersey waters by non-residents.

The governor refused to interfere until the sheriff had undertaken to seize the vessels used. He pointed out the provisions of the statute in question, authorizing seizure and forfeiture as the remedy for the offence.

(*Record, page* 16.)

The seizure was made by the sheriff and many others, on the 26th day of September A. D. 1862.

Michael Fay (being one of the citizens of New Jersey who took part in the seizure) laid before justices of the County of Monmouth, on the next day, a formal informa-

tion, alleging the offence of raking clams by the defendant on the 23d and 26th days of September, A. D. 1862, on board his vessel "in the rivers, bays and waters of the State of New Jersey, *to wit*: in Raritan bay, in said County of Monmouth," and that the vessel "was then and there on "said 26th day of September, seized and secured by said "Fay," and praying for a decree of condemnation and order of sale.

(*Record, page* 18 *and* 19.)

When the vessel was seized, she, with the defendant in error and his crew on board, was taken up the Shrewsbury river, opposite the sheriff's house, on the Highlands, where the sheriff anchored her for the night; and defendant in error remained there till morning.

(*Record, p.* 15 [44], 16 [45].)

When the vessel was seized, the defendant in error knew she was seized for violating the New Jersey statute, and said he had taken counsel and been advised that he could rake in any waters of the United States.

(*Record, p.* 17 [47].)

On the second day of October, A. D. 1862, the justices signed and sent to the defendant in error's house, on Staten Island, a notice stating that Fay had filed the information and its substance, and the prayer for condemnation and sale, and informing him of the time and place appointed for hearing, which was the 6th of October, 1862, "when and "where he might answer and make defence to the informa- "tion."

(*Record, p.* 17, 19 [55].)

The hearing was adjourned to the 11th of October, 1862, and it was then proved before the justices that on the 9th of October, the defendant in error had notice of the adjournment.

(*Record, p.* 20.)

Defendant in error did not appear and the justices proceeded. Nine witnesses were sworn and written evidence was also offered.

The justices then "adjudged that the information was "true: that the said John Whitman did rake and gather "clams * * on the times stated in said informa- "tion, on board the said boat or vessel called the Ann L. "Whitman, in the waters of Raritan Bay aforesaid, in the "County of Monmouth and State of New Jersey; and that "the said John Whitman, at the said times of committing "said offenses was not an actual resident or inhabitant of "this State, and had not been for six months preceding, an "actual inhabitant or resident thereof; and *that the said "boat or vessel was, on the said twenty-sixth day of Septem- "ber last, while so used and employed, seized and secured "by the said Michael Fay.*"

They then adjudge the vessel forfeited and order her sold.

(*Record, page* 19 *and* 20.)

The sale was made *under* the decree of condemnation.

(*Record, p.* 20.)

About the time of the trial of the common law action, A. D., 1864, the justices made a certificate that they had jurisdiction of the cause.

(*Record, p* 22 [60]).

In relation to the decree of confiscation, the following took place at the trial:

Before the charge of the court the plaintiff in error insisted that the matters produced and given in evidence on his behalf, were sufficient and ought to be admitted and allowed as decisive evidence to entitle the defendant to a verdict and to bar the defendant in error of his action, &c.

The judge then delivered his opinion that they were not, and the plaintiff in error excepted.

The court charged the jury that the record was prima facie evidence of the raking of clams in Monmouth County, and threw upon the defendant in error the burden of the proof on that point, to which the plaintiff in error excepted.

The plaintiff in error asked the court to charge several propositions.

1st. That the record was conclusive; 2d. That it was conclusive except as to jurisdiction, which the court refused, and the plaintiff in error excepted.

These propositions and the refusal will be more fully stated in the assignments of error.

The charge and refusals to charge set forth in the bill of exceptions raise:

7th. The question whether the justices who condemned the vessel were not (within the statute) "justices of the peace of the *county* where the seizure was made"—though the place of first taking possession of the vessel was within no county, yet within New Jersey.

8th Question. Whether the seizure was not (within the statute) made wherever the vessel was taken to—that is to say, in the Shrewsbury river—the place of first taking being in Raritan bay, in New Jersey, but out of the county; and whether the language of the verdict is not to be construed as applying to the first taking, and not to the seizure mentioned in the statute.

9th Question. Whether,—the only issue of *fact* as to the invalidity of the condemnation, being whether the seizure was in New Jersey simply, irrespective of any county; or altogether out of New Jersey—the decree of condemnation was not conclusive unless the seizure was proved to be out of New Jersey?

10th Question. Whether,—under the circumstances proved *aliunde* the decree of condemnation to show the seizure within the territorial jurisdiction of the State, and to show apt notice to justify a proceeding *in rem.*, and actual opportunity given to defend before the condemning court—that decree was not conclusive on all points adjudged therein, including the adjudged fact of the seizure in the County of Monmouth.

The judge, at the trial, excluded evidence offered by the

plaintiff in error of a raking of clams by the defendant in error in New Jersey, on the 23d, 24th, and 25th days of September, 1862, *i. e.*, for the three days preceding the seizure, and his ruling was excepted to.

(*Record*, *pages* 17 & 18.)

This involves an eleventh question, raised by the exception to the ruling, whether a raking of clams on the very day of the seizure is necessary to justify the seizure.

ASSIGNMENT OF ERRORS.

1st. The record is so defective that the court below could not properly render any judgment thereupon. The jury with deliberate intent, and, at the request of the court, did not pass upon or give any verdict in substance or in form upon the material issue made by the plea and replication—whether the defendant raked clams in the State of New Jersey (within or without a county), and thereby made his vessel liable to seizure by the plaintiff in error.

2d. That the judge below erred in that he declared and delivered his opinion to the jury "that the said several mat- "ters produced and given in evidence on the part of the "said defendant, were not sufficient to bar the said plaintiff "of his action."

(*Record, page* 24 [66].)

3d. That the judge below erred in that he declared and delivered his opinion to the jury "that the record offered "by the defendant in justification of the proceedings before "the justices of the peace condemning the said vessel, finds "that the plaintiff was engaged that day in taking clams "from the waters of the County of Monmouth, in the State "of New Jersey, and that finding in the record is *prima* "*facie* evidence of the fact itself and throws upon the plain- "tiff the burden of proof on this point."

(*Record, p.* 27 [76] 28 [77, 78]).

4th. That the judge below erred in refusing to charge the jury as requested.—"First, that the record of the said "justices of the peace was conclusive against the plaintiff "in said action, as to all the facts passed upon by the said "justices appearing in said record."

5th. That the judge below erred in refusing to charge the jury as requested—"That the said record is conclusive

"against the plaintiff in this action as to all the facts there-
"in contained, excepting as to the question of jurisdiction,
"and that the jury should not regard the oral testimony
"given by the plaintiff so far as it extends to impeach the
"findings contained in the said record, excepting as to the
"question of jurisdiction."

6th. That the judge below erred in refusing to charge the jury as requested: "That the said record of the said justices
"is conclusive against the said plaintiff in this action, and
"and that he has no right to review in this action the find-
"ing of the said justices as contained in said record."

7th. That the judge below erred in refusing to charge the jury as requested: "That the oral testimony produced by
"the said plaintiff in this action, so far as it conflicts with
"the findings of said justices in said record was immaterial,
"and should not be regarded by the jury in rendering their
"verdict."

8th. That the judge below erred in that when the plaintiff in errors' counsel proposed the following questions to the witness Lewis:

"Had you seen the Whitman on the water between Sandy Hook and Port Monmouth dock dredging for clams before 26th September, 1862?" he excluded the question.

(*Record*, *p.* 17 *and* 18.)

9th. The judge below erred in this that when "the de-
"fendant's counsel offered to prove that the plaintiff was
"raking and dredging for clams with the Ann L. Whitman,
"in the waters of Sandy Hook bay, between Port Mon-
"mouth dock and Sandy Hook, and south of the main
"channel which runs east and west by Sandy Hook, on the
"23d, 24th and 25th of September, 1862," the said judge excluded the evidence.

POINTS AND ARGUMENT.

I.

The special plea tendered, and (if that were doubtful) the replication accepted, the issue whether the clams were raked in New Jersey; and not simply the issue whether they were raked in any county of the State.

The court from the obscurity or ambiguity of the pleadings is frequently called upon to determine what is really in issue—and this it must do by giving construction to them.

The only place it was necessary for the defendant to plead that the clams were raked in, was in the place mentioned in the statute.

It would have been sufficient as a matter of defence for the sheriff to bring himself within the language of the statute; but, to comply with the old rules of pleading, which required a venue for every allegation, the county was alleged as the place, but under a *videlicet*.

This venue under a *videlicet* is never the material or substantial part of the allegation.

The plea in this case states first that the raking was in Raritan bay, within the State of New Jersey.

(*Record*, *p.* 6 [14].)

Then, to comply with the *form* of stating a venue a *videlicet* follows, thus: "*to wit: in that part of said Raritan* "*bay westwardly of the middle thereof, within the boun-* "*daries of the County of Monmouth, in said State of New* "*Jersey.*" The description of the place under the *videlicet* is further continued by reference to its relative position to Sandy Hook and the main shore of Monmouth County.

Generally, what is alleged under a *videlicet* is immaterial and is so considered by pleaders.

Here, what followed the *videlicet* was undoubtedly immaterial to the question whether the sheriff was right in *seizing* the vessel, for the statute expressly says (*Record, p.* 8, *Sec.* 7) "that it shall not be lawful * * to rake clams in any "of the rivers, bays or waters of this state, on board of any "vessel," &c.; and section 9, "that it shall be the duty of *all* "sheriffs and constables, and may be lawful for any other "person or persons to seize and secure any such vessel as "aforesaid." Of course this means a seizure within the State and not out of it.

The sheriff was bound to seize the vessel if she was used to rake clams "in any of the vivers, bays, or waters of the "*State*," not only in case she was used to rake clams in any county. To make the *seizure* lawful, neither the raking of clams nor the seizure need be within the county, though to make the *condemnation* lawful the seizure must be.

It is not the sheriff of the county in which the raking takes place who is to seize, but *all* sheriffs are required to do so.

But, if a narrow construction were given, and the statute were construed to mean that only the sheriff of the county where the clams were raked is to seize, the sheriff was, nevertheless, by this statute permitted, as a citizen, to seize the vessel; and, as a citizen, is not restrained by the implication that might attach to him as sheriff of a county; so that it was entirely immaterial for the plea to allege (to justify the *seizure*) that the clams were raked in any *county*. Being immaterial to make such an allegation, the court would, if necessary to the justice of the case, hold that what follows the *videlicet* is merely formal; and the substantial issue tendered to be of a raking in *New Jersey* waters, whether in any county or not.

The sheriff, or at least any citizen, had a right to seize the vessel any where in the State, within a county or without a county, if the vessel was used for raking clams anywhere in the State, within a county or without it; and the plea should not be construed to raise a defence which is

much narrower than it should be or might be, unless the court are compelled to construe it so.

Especially will they not do so, when the replication takes issue distinctly upon a raking of clams in New Jersey.

The replication is undoubtedly double, and was intended to be so. It traverses separately many allegations.

It plainly intended to traverse that the defendant in error raked clams anywhere in New Jersey. It does so, and it intended to do so.

The former analysis of the replication presented in the statement of the case (page) plainly shows this.

It seems to me that the court ought to hold, that one of the issues was,—whether there was a raking of clams in New Jersey, within or without a county. Their warrant for doing so will be that *that* was a good defence for seizing the vessel any where in New Jersey; that *that* was set up in the plea, and what follows that allegation about its being in the *county* is stated under a *videlicet;* that the plaintiff treated it as tendering the issue of a raking in the State, as well as the issue of a raking in the *county*—and traversed it singly and by itself; and traversed the allegation of the raking in the *county* separately, singly and distinctly as a separate allegation.

II.

The issue whether the raking of clams was in New Jersey (within or without the county) was a material issue.

This is plain; for it is anywhere in the State that raking is forbidden; and for raking anywhere in the State the statute says, all sheriffs shall seize and all citizens may seize the vessel used.

The defendant in error by passing by the allegation in the plea of his being a non-resident, admitted it.

The disqualification being admitted, and the seizure admitted, it was vital for the sheriff to show a raking of clams in the State. If this issue was joined it was material. The considerations suggested in the fourth point will further show the materiality of the issue.

III.

The only issue of *fact* upon which the owner of the vessel put the invalidity of the condemnation was, whether the seizure was in New Jersey simply; *not* whether it was in Monmouth *County*.

A question like this is a very material matter, and of the greatest importance to all litigants. It was not necessary for the plaintiff in error to prove all of his justification; but only that part which was denied, and all that was denied was a seizure in New Jersey.

The seizure condemnation or sale is not alluded to in the replication, except in the last averment.

The replication traverses the third allegation of the plea as to the raking of clams, &c., with great particularity, and was faulty in duplicity beyond precedent; but it was intended to be so in order to obtain the advantage of a denial of each fact.

It *traverses* no other allegation in the plea.

But it avers that the vessel "was not seized, condemned "or sold according to the law of the State of New Jersey, "in manner and form as set forth and alleged in the plea."

If the replication stopped here, it would have been very difficult to say what was intended—whether that the vessel "was not seized or condemned or sold according to the law of the State of New Jersey," because that law was not pursued, or because it was not applicable. If it was meant that the law of New Jersey was not applicable to the vessel, it was an argumentative denial of the raking of clams in New Jersey; or, that being admitted, it was an argumentative denial of the seizure in New Jersey.

The replication undoubtedly did mean simply that the vessel had not become subject to the New Jersey law; had not been within its territory, and, therefore, the seizure, condemnation and sale were not according to the New Jersey law. Neither the sense nor the sentence is complete by the allegation that the vessel "was not seized, condemned or sold according to the law of New Jersey," and therefore the pleader adds a description of how she *was* seized.

He does not state how she was condemned, because if she was seized, as the pleader says she was, she could not have been condemned according to the laws of New Jersey. What the pleader says is: "But was seized and taken by "the defendant on the high seas."

Yet this does not show all he means to allege, for he adds, "and without authority of law," *i. e.*, the law of the high seas did not justify her seizure. He continues: "And "without the territorial jurisdiction of *any* State;" *i. e.*, the New Jersey law did not extend to her; she was not in New Jersey to be seized. And as if to make it perfectly plain, he says, "as alleged in the said declaration."

Where then was it that the replication intended to allege the seizure of the vessel was *not?* New Jersey or Monmouth County? What was the issue intended? Was it not simply the issue tendered in the declaration? "You "have seized my vessel on the high seas. Your justification "is null; not because you did *not* seize in Monmouth County "but because you seized out of New Jersey altogether."

This is the only part of the replication which alludes to the condemnation.

How was the condemnation impeached? What *issue of fact* was made by the replication on the question of the validity of the condemnation? Was it anything more than that the vessel was not seized in New Jersey?

It is true that if out of New Jersey the seizure was out of Monmouth, but out of Monmouth may be in the State; and it is matter of great importance to the party to be apprized that a decree of a court under which he claims is disputed on one ground or another.

Surely the jurisdiction of a court ought in an action of trespass to be impeached on clear and unmistakable grounds.

It gave to the defendant larger liberty to prove the seizure, if the allegation was that it was not seized in New Jersey; but it narrowed him immensely if his right to seize was limited to the county of Monmouth by the pleadings.

By the statute which he pleaded he could seize anywhere in the State. I think that the court should hold that the issue was as broad as his authority.

It was for the replication to impeach the decree or traverse it. It did not traverse it.

It admitted it was made by not traversing, and avoided it by alleging the seizure was not in New Jersey.

IV.

If the defendant in error raked clams in New Jersey (within or without a county), and the plaintiff in error, as sheriff or citizen, seized her in the State, irrespective of the county (as the jury found he did), the sheriff is perfectly justified under the pleadings in the case even if the condemnation is invalid.

The sheriff is mulcted in heavy damages without a material issue being determined.

The jury found he seized in New Jersey. The replication admits the defendant in error was disqualified to rake clams in New Jersey.

Yet the sheriff is mulcted without the jury finding whether the fact which would have justified him, and which was alleged by him in defence—was true or false.

It may be said it was his duty to give information and have the right of the seizure adjudged, or thereby his seizure

became unlawful and cannot be justified. He pleaded he did give such information, and that the seizure was adjudged lawful. The replication did not traverse that allegation, and his duty is, therefore, admitted on the record to have been performed in that respect.

The only part of the replication that relates to the information and condemnation is the last averment. This does not deny that the sheriff gave information, or that the justices condemned, but denies the validity of condemnation on one ground: that the sheriff *seized out of New Jersey.* Thus, in truth, the validity of the condemnation is not put in issue, except upon a ground which the jury have negatived.

Nor can there be the slightest pretence that a single word in the replication put in issue the jurisdiction of the court on the ground of the seizure being without any *county;* it was on the ground that it was out of the State.

But if the sheriff did not give information, one of the captors did, and the statute was substantially fulfilled.

If he is not entitled to the benefit of this information, still he cannot be held responsible as a trespasser *ab initio* for not giving the information or putting the case in course for judicial determination, unless it is distinctly and clearly and *specially replied.*

(1 *Chitty's Pleadings*, 594).

There must be a new assignment.

Gelston vs. *Hoyt*, 3 *Wheat*, 326, 327.

It would be most unjust and moreover violate the rules of pleading, to hold the sheriff a trespasser *ab initio* on the ground that the decree was invalid because the seizure was not in the county, when the replication distinctly avoided putting the invalidity of the decree on that ground.

The suit having been commenced on the 11th October, 1862, and the decree of condemnation on the same day, and the basis of the action being that the trespass was "on the high seas," and could not be justified under the law of any State, and there being no neglect between the 26th September and the 11th October which would make the sheriff

liable, there was no possibisity of holding him as a trespasser *ab initio*.

Whatever neglect the plaintiff in error might have been guilty of, he cannot be responsible for in this action, for no such neglect is *specially* replied.

But the sheriff as such, or as a citizen, was not sued for, or if sued for, could not be held responsible for the *sale* of the vessel. This suit was brought in Superior Court of New York, Oct. 11, 1862.

(*Record, page* 2 [1]).

The sale did not take place till the 25th of October, 1862.

(*Record, page* 5, *in plea.*)

This allegation of the plea is not denied and is of course admitted.

So that the sheriff could not be held liable for any more than he did up to the 11th of October, 1862, when the suit was commenced; and really all he had to do to defend himself, was to justify the *seizure.*

The seizure is really all that the sheriff took part in, and when he justified that he made out his defence.

It is undoubtedly the duty of an officer seizing for a forfeiture to get the *thing* condemned as soon as he conveniently may; and if he does not, he is bound to show a reason for his delay.

But in the case of *Jecker* vs. *Montgomery*, 13 *Howard*, 512, which was the case of a libel filed by a neutral against the captor, alleging seizure without cause: that the captor had not proceeded in a court having jurisdiction to condemn: that he had nevertheless sold the vessel; *and had thus made himself a trespasser ab initio*—this court held that though the captor had proceeded before an incompetent court, the vessel should not be restored until he had had an opportunity of going before acompetent prize court. This court would not determine the question whether the seizure was lawful or not, on the neutral's libel, p. 517.

This is now the usual course.

1 *Curtis, C. C.*, 269, *Fay* vs. *Montgomery.*

It will be seen that in this case there was a distinct charge that the captor had rendered himself responsible as a trespasser *ab initio*.

The form of pleading even in admiralty shows that any neglect in not proceeding in a competent court should be distinctly charged.

In the common law courts it must be specially replied by way of new assignment.

1 *Chitty*, 594.
3 *Wheaton*, 326, 327.

There is no new assignment in this case. The final allegation of the replication is no more than an allegation that *by reason of the seizure being out of New Jersey*, and on the high seas (which the jury negatived), the seizure and condemnation were without authority.

There is no new assignment here that the captor did not proceed before a competent court, and therefore was a trespasser *ab initio;* but the allegation is that he could not have done so at all whether there was a cause of seizure or not, as he stepped entirely out of his State to seize.

In truth there is no real issue on the condemnation at all, but on the raking of clams and the seizure in New Jersey.

The sheriff had no reason to think that any other issues were made in the case, except those of raking clams and of seizure, each in New Jersey or out of it altogether. Indeed it seems to me that on the record the sheriff could not be held for even a conversion without a new assignment. His special plea did not justify the conversion—it denied it.

The first part of the plea would be construed to intend to justify it, if he had stopped after he had set out his justification of the seizure; but he did not stop, he added that he had not converted.

The plea must, it seems to me, be construed as not justifying the conversion, because it traversed it.

Whenever the justification is of the seizure and not of the conversion—there must be a new assignment.

3 *Wheaton*, 326, 327.

Why then was not the defence complete, if the seizure was justified?

The offence alters the property, as between the offender and the State, and the seizure, as to all others claiming intermediate the offence and seizure or afterwards.

The Mary, 1 *Gallison*, 192.
Gelston vs. *Hoyt*, 3 *Wheaton*, 311.

The title passes when the capture is complete, and the question of condemnation can never arise between the captor and the offender, but it may between the offender and a purchaser without condemnation.

1 *Kent*, 101, 102, 103.
The Adventure, 8 *Cranch*, 226.

As between the owner and a State or the captor acting under its authority, the owner cannot dispute the propriety of the captor's going to a court duly established as a prize court, though by an internal regulation of the State of the captor, he is required to go into a court in one district and he goes into another.

Chief Justice Marshall says: All courts, especially foreign courts, would overlook this as an irregularity merely, because the sovereign power possessing jurisdiction over the thing, must be presumed by foreign tribunals to have exercised that jurisdiction properly.

Hudson vs. *Guestier*, 4 *Cranch*, 294.

In the case in 13 *How*, 512, the sovereign had not established the court which condemned at all for any purpose, or with any jurisdiction.

After seizure the sovereign has the title, but until condemnation in trust for the true owner, the captor, or the original owner.

1 *Kent*, 102.

But the offender may call upon the captor to condemn and obtain restitution if he does not.

Jecker vs. *Montgomery*, 13 *Howard*, 516, 517.

The practice since this case is so.

Fay vs. *Montgomery*, 1 *Curtis, C. C.*, 269.

If he proceeds in a common law court by action, and the seizure is justified, the owner must specially *new assign* the fact of unreasonable delay in condemning.

3 *Wheaton*, 326, 327.

But between September 26 and October 11, when this action was commenced, there could be no unreasonable delay.

In this case it was not charged in the replication that the sheriff was intended to be held liable for not condemning in due time or not at all—but for seizing the vessel out of *the State of New Jersey*, and for seizing the vessel when it had not been *used* to commit the offence of raking clams in New Jersey.

The jury found he seized in New Jersey, but did not pass on the fact whether the vessel was used to rake clams in New Jersey.

A part of his defence, the disqualification of the defendant in error, was admitted; another part, the seizure in his own State, was found by the jury; but the only and material issue after these two facts are found, has not been passed upon, and yet he is mulcted in damages.

V.

The verdict must be considered as finding only the three facts on which the judge asked the jury to pass, to wit:

1st. That the vessel was seized in New Jersey.

2d. But not in any county.

3d. That the defendant in error did not rake clams in Monmouth County;—and cannot be held to be a general verdict on all the issues.

A general verdict is a finding in the *terms* of the issue.

2 *Tidds Practice*, 969.

It is undoubtedly true that courts in modern times have gone a great way in supporting verdicts, and might possibly hold that an entry even on the record of the informal verdict, "the jury say they find for the plaintiff and assess his

damages at $," would be in substance a finding on all the issues, and justify the court in disregarding the informality.

But here is no intent on the part of court or jury to find on all the issues unless the finding of the three facts is such a finding.

It is a clear case of the court and jury intending to have found, and to find, but the three facts.

The direction of the court is specific, and in substance this: "Find on the three facts, no matter which way, and "return a verdict for the plaintiff and assess his damages, "and the court will take care of the rights of the parties."

(*Record, page* 28, 29.)

The formal entry on the record is exactly in the language of the three questions of the court and the three answers of the jury; the one being incorporated in the other, *and no more.*

(*Record, page* 14.)

Nothing shows more clearly the intent of the court than its refusal to receive a general verdict; and sending the jury out again, and the jury returning again and giving a verdict different from that first rendered. The first or rejected verdict said: "We find for the plaintiff." The second contains no such statement.

(*Record, pages* 28, 29.)

What we complain of is error on the *record itself.* It shows a material issue not passed upon. These directions of the judge and the answers of the jury are useful to show that no intendment can be made in favor of the verdict as one on all the issues; that there was no intention to pass upon a material issue, for the court overlooked its materiality.

We show these matters, which are exhibited in the exceptions, to prove that the record itself, as it stands, ought not to be aided by any intendment.

When the court refused to receive the common but informal verdict, "we find for the plaintiff, $3500," it is plain

the court did not intend that it should stand as a general verdict.

The *record* cannot be helped by any intendment. The intention is manifestly to pass on the three facts only.

It turns out that these three facts by no means determine the material issues on the record.

The verdict would seem to be incomplete and the record clearly imperfect, and the plaintiff in error should not have been mulcted in damages without his defence having been passed upon.

VI.

The clear and purposed omission of the jury to find a general verdict, and their omission to meet the issue whether the defendant in error raked clams in New Jersey, within or without a county, leaves the record so imperfect that no judgment ought to have been entered upon it, and it ought now to be reversed.

This seems sufficiently established by the foregoing considerations.

The reports of the United States are full of examples of reversals in such case, and of award of *venire de novo*. One case is sufficient.

Garland v. *Davis*, 4 *Howard*, 131.

VII & VIII.

The justices of Monmouth County were (within the statute) justices of the peace of the county where the seizure was made.

The vessel was *taken* into Shrewsbury river within Monmouth County. The captor, as the statute says, is to "seize and secure" the vessel. The seizure is not complete without the vessel being made secure.

She was made secure in Monmouth County. When the words "justices of the county where the seizure was made" are used as descriptive of the justices who may condemn, it may fairly be understood to mean "justices of the county where the seizure was made" *perfect and complete* by being made secure, as before required by the statute as part of the duty of the captor.

A *holding* of property legally seized is a seizure in the place where it is held. *Miller* v. *U. S.*, 11 *Wallace*, 294, 295, 298, *and Dissenting Opinions*, 324, 326. And this especially where a sheriff seizes by direct authority of the sovereign, as the marshal did in the case in 11 *Wallace*, 308, 290.

To hold that the seizure by the sheriff in New Jersey, but out of Monmouth County, constituted the whole of the seizure, though the property was brought into Monmouth County and there *held*, would be to sacrifice substance to form.

11 *Wall.*, 295.

The seizure intended by the act must be construed to be a seizure which is adapted to the circumstances of the case.

11 *Wallace*, 296.

And in a case where the county line and the State line are not coincident, and the statute requires the captor to give information to justices of a county where the seizure was made, it means such seizure in a county as was made in a county—or such part of a seizure as was made there—that is, the securing of the prize.

The language of the verdict, too, may, in view of the facts developed by the bill of exceptions, be taken to mean that only the first part of the seizure—the taking—was not in Monmouth.

IX.

The decree of condemnation being impeached by the replication simply on the ground that the seizure was out of

the State, the decree of condemnation was conclusive unless it was proved that the seizure *was* out of the State.

But little need be said under this point, as, if the third point is established, this must follow.

The decree was pleaded, and was open to impeachment only on the ground on which it was impeached by the replication. This ground of impeachment totally failed. The jury found the seizure within the State.

The judge ought not to have charged that the decree was only *prima facie* evidence.

(*See.* 3*d*, *error assigned.*)

And ought to have charged as requested.

(*See.* 5*th*, *error assigned.*)

And as requested.

(*See.* 4*th*, 6*th and* 7*th*, *errors assigned.*)

It may be proper to add that the issue of a seizure within or without the State was material, for if the seizure was without the State it impeached the decree just as much as a seizure out of the county.

X.

Under the proof that the seizure was within the territorial jurisdiction of the State, and the vessel *secured* by carrying her into the Shrewsbury river, in Monmouth County; that the defendant in error was on board at the time the vessel was seized and until the anchor was dropped in Shrewsbury river—the apt notice of a proceeding *in rem*—all of which was *aliunde* the decree—it was the duty of the court to charge the jury that the decree was conclusive on all the points adjudged therein, including the adjudged fact of the seizure in Monmouth County.

(*See* 3*d*, 4*th*, 5*th*, 6*th and* 7*th Errors Assigned.*)

A foreign decree is never a decree of a court of record, in a technical sense. Only decrees of domestic courts are such.

Smith v. *Nicholls*, 5 *Bing., N. C.*, 208.
Ricardo v. *Garcias*, 12 *Cl. & Fin.*, 395.
Walker v. *Witter*, 1 *Douglass*, 1.

Foreign decrees do not stand or fall by any test, whether the court making them is of record or not—inferior or not.

Out of the jurisdiction of the sovereign creating the court, the decree stands or falls by the law of nations. The decrees are not always based on the law of nations; but they receive "full faith and credit" under that law if they are *in rem;* less faith and credit, if they are in *personam.*

It is necessary from the nature of the case, that a foreign judgment *in rem*, decreeing a forfeiture for violation of municipal laws, should be conclusive, or of *no* effect whatever.

It is not necessary that a foreign judgment *in personam* should be conclusive or of *no* effect.

Judgments *in personam* are and may be rendered in as many different nations as the defendant enters, whether there is a judgment in any other or not.

The nature of proceedings *in personam* is such that the party entitled can, regardless of his former judgment, not only prove his case, but he can get exactly the same judgment in every nation that he has already obtained in one—a judgment that his debtor pay him.

Inasmuch as, in a case *in personam*, the relief sought is the same in each nation and on the same facts, the first judgment may properly be held as *evidence* of them—and conclusive or not as each nation chooses.

But a judgment *in rem* decreeing a forfeiture for a violation of municipal laws, cannot be rendered in any nation to which the condemned vessel may go. Other nations will not allow their courts to exercise a jurisdiction *in rem* in such case. The courts of other nations therefore do not find it necessary to ascertain the facts justifying a decree *in rem*, for if they ascertained them they could not render the judgment. Nor can they notice the judgment *in rem* at all unless it is

conclusive. It cannot be used as *evidence* that they should render a judgment *in rem;* for they cannot render such judgment.

These judgments must come before such courts collaterally or not at all.

They are produced as evidence of a title divested. If they divest—they divest it—they do or they do not. Their effect is conclusive, if they have any effect. They are not mere *prima facie* evidence of title; they do not import—more or less—that the title has been divested, but they actually divest it. They are the very instruments which divest and if they exist and are valid—their operation is effectual. They if valid are conclusive muniments of title; or they are nothing. They are conclusive that title has passed or they are of no use whatever. There is a necessity that *full* faith and credit be given to them—or that none be given.

It makes no difference whether the court pronouncing the judgment *in rem* is of record or not, inferior or not—the judgment by whatever court rendered—if valid—passes title and of course must be conclusive evidence that it has passed. If they are not conclusive they are nothing. "Full faith and credit" must be given to them irrespective of the U. S. constitution or any act of congress; or no faith at all. In this they differ from judgments *in personam.* They may be evidence—more or less strong—of the party's title to a new judgment *in personam.* All of the cases which speak of foreign judgments being only evidence—must be considered as speaking of judgments *in personam;* as a judgment *in rem* is of no use at all unless it is conclusive, its sole object being to divest title.

Lord Mansfield in *Rex* vs. *Grundon, Cowper R.*, 321, 322, says: the judgment of an *admiralty court* is conclusive till reversed.

Ch. J. Marshall in The Mary. 9 *Cranch*, 144, 145, 146, gives the reason for judgment *in rem* being conclusive—that the courts giving them have exclusive jurisdiction.

Of course a judgment *in rem* may be impeached if the court has not jurisdiction. So may that of every court, no matter how high or transcendent its jurisdiction.

The court of the two justices, under the New Jersey sta-

tute, is a court of general jurisdiction over vessels seized for raking clams in New Jersey, where the seizure is made in the county of the justices—in exactly the same sense as the *Inferior* Court of Common Pleas in the County of Hunterdon, in New Jersey, and the Inferior Court of Common Pleas of the county of Sussex, in New Jersey, were held to be over forfeitures of land in those counties respectively for treason in the case of *Kemps, lessee*, vs. *Kennedy*, *5th Cranch R.*, 173, 174, 184, 185, and is entitled to just the same presumptions in its favor as those courts.

Though the names of these courts was "Inferior Courts," it was held they were not inferior in the technical sense. Their jurisdiction was also confined to the county, and yet they were held courts of general jurisdiction.

(*See Moravia* vs. *Sloper Willes*, 37.

Indeed a court proceeding by written information, and with all the deliberation and formality that was observed by the two justices in this case, should be treated with the utmost consideration.

The rules that have been held applicable to the inferior courts in England are not applicable to a case like this. The proceedings of the county courts and other inferior courts, even those of record, are conducted in a manner that entitles them to the least possible consideration.

How they are conducted will appear in the case of *Thompson* vs. *Blackhurst, Neville & Manning*, 266.

The entries are exceedingly meagre, as will appear by reference to this case. Though the judgment was disregarded by the higher court it was put by Denman, Ch. J., and Taunton, J., distinctly on the ground of fraud and collusion between the court and the party.

In *Rowland* vs. *Veale*, *Cowper R.*, 19, 20, the plaint in an inferior court is set out, and though it was not alleged that the defendant became indebted within the jurisdiction, the judgment was held conclusive on the demurrer to the plea justifying a seizure under a *fi. fa.* Lord Mansfield said the defendant should have availed himself of the fact that the cause of action did not arise within the jurisdiction by plea in the court below.

The latest English cases hold that a foreign judgment or decree cannot be impeached, unless it appear that the party had not an opportunity to be heard.

Reynolds vs. *Fenton*, 3 *Mann*, *Grang & Scott*, 187.
Ricardo vs. *Garcias*, 12 *Cl. & Fin*, 368, 378, 389, 392, 400.
Martin vs. *Nicolls*, 3 *Simins*, 458.
Vanquelin vs. *Bonard*, 15 *Com. B., N. S.*, 341.
Nallee vs. *Dumergue*, 4 *Excheq.*, 290.
Simpson vs. *Fogo*, 9 *Jurist*, *N. S.*, 405.

Of course this presumes that the court, by its constitution, had power to hear and determine the matter.

These cases are cited to show that now a foreign judgment *in personam* is not mere evidence.

A foreign judgment *in rem* is conclusive the world over, and it must be so.

9 *Cranch*, 144, 145.

This proposition also, assumes that the foreign court had jurisdiction.

The question that arises in this case as to the right to contradict the record, is two-fold:

First—If the foreign court is created by sovereign authority—if by its constitution it is authorized to hear and determine all questions of the lawfulness of a seizure where the seizure happens within a certain county; and to condemn if the seizure is lawful; and it appears by the record of the court, that the court in good faith inquired into the question whether the seizure happened in the county, and adjudged it did, and that the seizure was lawful, and that the vessel seized should be condemned, can the owner on principle contest this judgment that the seizure was within the county, and that collaterally?

Second—Can the owner as between him and the sovereign or those who act by his direct authority, impeach the condemnation on the ground that the seizure was not in the *county*—if it was within the jurisdiction of the State.

In the first case stated—that of the court whose jurisdiction is questioned—passing upon the very question whether

the seizure was within the county—on what principle can this be open to inquiry collaterally?

The owner had the apt notice by being on board at the time of seizure. (*Record*, *p.* 15.)

The seizure was within the sovereigns jurisdiction as the jury have found. (*Record*, 14, 29.) The vessel was carried with the owner on board into the county. (*Record*, *p.* 15.) This is apt notice within the county. He had actual notice —was notified in writing he could appear and answer and defend the information; the substance of the information being communicated to him. (*Record*, 17.)

So far as notice was concerned he had the notice apt to a proceeding *in rem*, by being present on board at the time of seizure, and besides that actual notice which put him fully on his guard.

Now, having notice and an opportunity to be heard, in what better situation is any other court than the condemning court—to pass upon the question where the seizure was. It was vital to the jurisdiction of the court. It was a question that was spread upon the record and appeared by the information.

It was therein alleged as a fact to be proved. The fact was recent and proof was made and the court adjudged where the seizure was made—that it was made in the county.

The court had no more right to condemn the vessel if the seizure was not made in the county, than it had to condemn it without proof that it had been used to rake clams in New Jersey.

Its attention was called to the question—it passed upon it and adjudged it—the party now disputing it having legal notice and a full opportunity to be heard.

It is impossible that any other court can have better opportunity of ascertaining the truth than the court of two justices had. Any court or jury before whom the same question of fact comes is as likely to err as the two justices.

Is not the only question in a case where a party has notice —and the court decides a jurisdictional fact after its attention is specially drawn to it by the pleadings in the case—is not the only question whether the court fraudulently or collusively decided it.

(*See Bradstreet* v. *Neptune Ins. Co.*, 3 *Sumner's R.* 609.)

There is a class of cases which will prohibit the proceedings before the justices from being disputed collaterally on the adjudged fact of the place of seizure, though the place of seizure is a jurisdictional fact. The proceedings are protected by the considerations suggested—notice of them—the introduction of the jurisdictional fact in the allegations of the prosecuting party; and the passing upon it by the court —all, of course, in good faith.

The cases are collected in 2 Smith's leading cases, 1,009, 6th American edition.

19 *Barbour*, 22, 28.
Riley vs. *Waugh*, 8 *Cushing*, 220.
Cooper vs. *Sunderland*, 3 *Clarke*, 114.
15 *Indiana*, 395.
Sheldon vs. *Wright*, 1 *Selden*, 497.
Bumstead vs. *Bumstead*, 40 *Barb.*, 661.

It must be kept in mind throughout the investigation that the inferiority of the court has nothing to do with the question. A proceeding *in rem*, if there is jurisdiction, is conclusion the world over.

1 *Greenleaf Evidence*, §541.

Chief Justice Marshall, in *Rose* vs. *Himely*, 4 *Cranch*, 269, held that the situation of the thing—the place where it was at the time of the courts taking jurisdiction might be inquired into if it was a jurisdictional fact.

The case does not show whether the foreign judgment showed on its face that the place was such that it could not have jurisdiction, or that it was one of the allegations of the libel that it was in place A, where the court had jurisdiction. It is not at all unlikely that the decree should, on its face, that the vessel was at a place B, where the foreign court had not jurisdiction. The Chief Justice says, p. 268, "the court pronouncing the sentence of *necessity* decides in "favor of its jurisdiction." This is a strong indication that it was not *expressly* alleged in the libel or expressly ad-

judged by the foreign court where the vessel was at the time of seizure.

Judge Johnson's opinion, p. 285, plainly shows that the question of the place of seizure was not brought to the notice of the condemning court, and that they did not adjudge it to be in a place of which the court had jurisdiction.

But the question on which Ch. J. Marshall gave his opinion was not argued before the court, p. 282.

Indeed, the case was distinctly overruled on the very point by this court two years afterwards.

In 6 *Crauch*, p. 285, in the case of *Hudson* vs. *Guesteir*, Marshal, Ch. J., says: "the principle of that case (*Rose* vs. "*Himely*) is now overruled." Story in his conflict of laws does not take notice of this, and states the doctrine as originally pronounced by Marshall. That the case of *Rose* vs. *Himely* is overruled on the very point is plain from what is said by Livingston, J., in *Hudsan* vs. *Guestier*, 6 *Cranch*, 284, with whom all the judges but the chief justice concurred. "And although *it be now stated* * * * that she "was captured more than two leagues at sea, who can say "that this very allegation if it had been essential, may not "have been urged before the French court and the fact de- "cided in the negative. And if so why should not its deci- "sion be as conclusive on this as on any other point."

This was the prominent point of the dissent of Judge Johnson to the decision in *Rose vs. Himely*, see 4 *Cranch*, 285, 282-3-4.

Marshall in the case of *Kemp*, lessee, *vs. Kennedy*, 5 *Cranch*, 173, did not follow his own opinion in *Rose* vs. *Himely*.

Even the doctrine of *Rose* vs. *Himely* does not rule this case. It did not appear there that the place of seizure had been brought to the notice of the foreign court, or that it had decided where the seizure had taken place. In that particular, this case is to be distinguished from the case of *Rose* vs. *Himely* and the great multitude of decisions on the question of impeaching judgments for want of jurisdiction.

The fact that the jurisdictional fact is alleged and adjudged by the court is of the very greatest importance.

It is said in *Grignon's*, lessee, v. *Astor*, 2 *How.*, 319, 338,

that it is a test whether there is jurisdiction if on demurrer to the information or petition—jurisdiction appears.

This, of course, assumes that the court *is* a court, and not a mere sham; that it is created by the sovereign authority, and is so constituted by that authority that it would have jurisdiction if the facts alleged before it are true.

In the same case, p. 339-340, it is said that jurisdiction is conferred by the allegations. The allegation of the facts gives the court power to ascertain their truth. This is jurisdiction—power to ascertain the truth of the facts alleged before the courts as a foundation for its action.

(*See also Voorhees* vs. *The Bank of the United States.* 10 *Peters*, 478.
Brittain vs. *Kinnaird*, 1 *Brod & Bing.*, 432.
Cooper vs. *Reynolds*, 10 *Wall*, 316, 317.

But there is another question. Suppose it be admitted that the seizure was not in the *county*, but (as the jury found), within the State of New Jersey, can the owner impeach the decree of condemnation as between him and the State, or its officers.

There is much authority to show that he cannot.

In *Rose* vs. *Himely*, 4 Cr., 278, 279, Chief Justice Marshall put great stress upon the fact that the vessel was never *brought* within the jurisdiction of the court or within the dominion of the sovereign whose laws were infracted.

If the seizure in *Rose* vs. *Himely* had been within the dominion of France, as the seizure of the sheriff here was within the territorial jurisdiction of the State of New Jersey, and if the vessel had been brought into St. Domingo as the vessel here was brought into Shrewsbury river in Monmouth County, the decision in *Rose* vs. *Himely* would have been that the court had jurisdiction, and that the decree there was conclusive.

In *Hudson* vs. *Gustier*, 4 *Crauch*, 294, Chief Justice Marshall says: "The laws of the United States require that a vessel which has been seized for violating them should be tried in the *district where the offence is committed*, and certainly it would be *irregular* and illegal for the tribunal of a

different district to act upon the case. *But of this irregularity, it is believed no foreign court could take notice.*"

He proceeds to vindicate this doctrine. The considerations suggested and the authorities cited under the fourth point, show that when the question of title arises between the offender and the sovereign or his officers who make the seizure, the offender does not stand in the same position as he does when the question arises between him and a purchaser of the captor.

The conclusiveness of the decree does not depend on full faith and credit being given to it under the act of Congress. It is entitled to full faith and credit, entirely independent of the Constitution or acts of Congress.

XI.

On the point, that the seizure need not be on the very day of the raking of clams, and that the judge erred in excluding testimony of a raking on the three days previous, but little need be said.

The act forbids the raking of clams, and declares the vessel used in the commission of the offence shall be forfeited and seized and secured and disposed of as directed in the ninth section. The vessel to be seized is one that has been used in the commission of the offence.

If it cannot be maintained that the person who is to be punished under the seventh section, must be caught in the act, how can it be maintained that the vessel must?

There is every reason why the court should not hold that the vessel must be caught in the act. The offence may be perpetrated daily, if escape from the jurisdiction purges the offence.

LASTLY.

There cannot at this day be any real question of the title of a State to the land in its *tide waters*, and the fish found there.

If anything is settled, it would seem that this ought to be settled.

This court held in *Martin* vs. *Waddell*, 16 *Peters*, 110, that the people of each State held the absolute right to all their navigable waters, and the soils under them, for *their* own common use, subject only to the rights surrendered by the Constitution to the General Government.

Martin claimed under a general act of New Jersey of 1824, p. 408, 379.

This is not a question between the State and its riparian proprietors. Whatever rights riparian proprietors claim in the old States, they claim under the State title.

This whole question of the right to control and restrain the taking of fish was discussed by Judge Washington in *Caufield* vs. *Coryell*, 4 *Wash. C. C. R.*, 371, and he held the right of the State perfectly clear, and that a non-resident could make no claim to take fish; that the Constitution of the United States in no wise controlled or interfered with the right of the State to say who should and who should not *take* fish.

(See also *Bennett* vs. *Boggs*, *Baldwin R.*, 60.)

In *Kean* vs. *Rice*, 12 *Sargent & Rawle*, 71, the constitutionality of the New Jersey act was passed upon by the Supreme Court of Pennsylvania.

This court in *Smith* vs. *Mayland*, 18 *How.*, 71, substantially decided the same question.

(See also *Osgood's case*, 6 *City Hall Records*, 4.)

In several of the States the question has been considered and decided.

The matter has been a subject of correspondenee between the Executives of the States from time to time, and the doctrine that each State has the right to control the matter within its borders has been generally, indeed universally, acquiesced in.

In September of 1872, the Circuit of the U. S. for New Jersey, in *Bevans* vs. *Compton*, decided the act of 1846 to be constitutional, and put the right of the State to pass the act on the property of the State in the shell fish. The act

has been in existence since A. D. 1719. The Court of Errors of New Jersey in November 1872, in *Haney* vs. *Compton*, decided the act to be constitutional, and put the right to pass the act of 1846 on the ground that the State owned the soil and the shell fish, and could prevent any one from subverting the one or taking the other.

In both cases a coasting license under U. S. was set up. Neither case has yet appeared in the reports.

ROBERT GILCHRIST,

10 *Of Counsel with Plaintiff in Error.*

EVENING POST STEAM PRESSES, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court.

JOSEPH I. THOMPSON,
Plff. in Error,

vs.

JOHN WHITMAN,
Deft. in Error.

Brief on behalf of the Plaintiff in Error.

Abstract or Statement of the Case.

This action was commenced on the 17th day of October, 1862, in the Superior Court of the city of New York, and on the 28th day of October, 1862, removed by an order of said court and in pursuance of the act of Congress to the Circuit Court of the United States for the Southern District of New York for further prosecution and trial.

The action is trespass brought against the plaintiff in error by the defendant in error for seizing his vessel called the *Ann L. Whitman*, her tackle, apparel and furniture, alleging in his plea said seizure was made

September 20th, 1862, on the high seas, in the outward vicinity of the Narrows of the port of New York, also alleging he was a citizen of the State of New York, and the plaintiff in error a citizen of the State of New Jersey, pp. 2, 3.

The defendant pleaded the general issue, also a special plea alleging that the defendant in error, an inhabitant and resident of the State of New York, was at the time of said seizure, to wit, September 26th, 1862, engaged with said vessel in the waters of Raritan Bay, within the State of New Jersey, to wit, in that part of Raritan Bay westwardly of the middle thereof, within the boundaries of the county of Monmouth and in the cove between Sandy Hook and the main shore of said Monmouth county, about midway between Sandy Hook and the bay shore, raking and gathering clams and pntting the same on board said vessel, contrary to and in violation of an "Act of the Legislature" of the State of New Jersey, in such case made and provided, being "An Act for the preservation of clams and oysters."

That at said time and within the waters of said State of New Jersey and within the boundaries of the said county of Monmouth, said plaintiff in error, being sheriff of said county, as required by said laws of said State of New Jersey, seized said vessel employed as aforesaid, and gave information thereof to two justices of the peace of said county of Monmouth, whereupon said justices, according to the provisions of said act, did appoint the 6th day of October, 1862, at 10 o'clock in the forenoon, at the village of Riceville, in the township of Middletown, at the hotel of Holmes Hendrickson, in said county of Monmouth, for the trial of said vessel, and said justices met at the place so appointed, and heard and determined the same, and did then and there, to wit, on the said 6th day of October, 1862, condemn said vessel, and on the 25th day of October, 1862, she was sold by the order of the said justices, under and in pursuance of said decree, pp. 5, 6.

Said cause came on for trial on the 19th day of January, 1864, before the Honorable William D. Shipman, judge, and a jury, p. 14. A number of witnesses were called by the defendant in error, seven of whom gave testimony tending to show said vessel was seven or eight miles from Coney Island at the time of the seizure, and nearer the Jersey shore than the New York shore, four or five miles from the Jersey shore and seven or eight miles from Coney Island and in the main ship channel.

The plaintiff in error called twenty-one witnesses, whose testimony tended to show when said vessel was seized she was about half-way between Sandy Hook and Port Monmouth dock, about half a mile south of a line drawn from Port Monmouth dock to Sandy Hook dock, and very nearly three miles south of the middle of the main ship channel that runs by Sandy Hook about two miles south by west of the southwest Spit Buoy, and about three-quarters of a mile from Port Monmouth dock and on the best clamming-grounds in New Jersey waters, pp. 16, 17.

Also that on that day said vessel was dredging for clams near Mill's dock, about a mile and a quarter from Port Monmouth dock and three to three and a half miles south of the southwest Spit Buoy, p. 17. When the vessel was seized the defendant in error said he had taken counsel, and that he had a right to dredge there. That he had a right to rake for clams anywhere in the waters of the United States. The plaintiff in error also read in evidence the original record of the proceedings before said justices in the matter of the said seizure of said vessel, p. 18, by which it appears that the said defendant in error did rake and gather clams on the 23d and 26th days of September, 1862, on board of said vessel in the waters of Raritan bay, in the county of Monmouth and State of New Jersey, and was not at said times an actual resident or inhabitant of said State, and had not been for the next six months preceding, and that the seizure of said

vessel was made at said place on said 26th of September, while so used and employed by the said defendant in error, and that by reason thereof the said justices did determine and adjudge that the said vessel, with all the clams, clam-rakes, tongs, tackle, furniture and apparel be forfeited and condemned, and that the same be sold, pp. 18, 19, 20. A transcript of said record was also read in evidence, pp. 21, 22. Said vessel was sold under said decree, p. 20.

It was insisted on the trial that the said several matters so produced and given in evidence in behalf of the said plaintiff in error were sufficient to entitle him to a verdict, and to bar the said defendant in error of his said action; but the court held that the same were not sufficient to bar the said defendant in error of his said action, to which the said plaintiff in error excepted, pp. 23, 24. The circuit judge then delivered his charge to the jury, pp. 24, 25, 26, 27, and, among other things, charged the jury that said record read in evidence by the plaintiff in error, condemning said vessel was *prima facie* evidence that the defendant in error was engaged in taking clams from the waters of the county of Monmouth and State of New Jersey, as therein found, to which the plaintiff in error excepted, and requested the circuit judge to charge the jury that said record was conclusive against the defendant in error as to all the facts therein found by said justices appearing in said record; also, that the jury should not regard the oral testimony given by the said defendant in error, so far as it tended to impeach the findings in said record; that the said defendant in error had no right to review in this action the finding of the said justices as contained in said record. The Circuit Judge refused so to charge, to which the plaintiff in error excepted, p. 28, and the circuit judge directed the jury to answer the following questions:

1st. Was the seizure of the *Ann L. Whitmann* made by the defendant within the limits of New Jersey?

To which the jury answered, yes.

2d. Was it made within the limits of Monmouth county?

To which the jury answered, no.

3d. Was the plaintiff engaged that day, the 26th of September, 1862, in taking clams within the limits of Monmouth county, in the State of New Jersey?

The jury answered, no.

4th. What amount of damages did the defendant in error sustain? Which the jury assessed at $3,500, pp. 27, 29; and afterwards, upon further argument on the third Monday of October, 1868, an order was made by the court that judgment be entered in favor of the said defendant in error for the amount so assessed by the jury, with costs, p. 29; whereupon judgment was entered in favor of said defendant in error for said sum, with costs, p. 30. A writ of error was thereupon taken by the said plaintiff in error to this court, and the said defendant in error filed his joinder in error thereto, pp. 30, 31, 32.

The plaintiff in error makes the following assignment of errors below:

1st. In charging the jury "that the record offered by the defendant (plaintiff in error) in justification of the proceedings before the justices of the peace condemning the said vessel, finds the facts that the plaintiff was engaged that day in taking clams from the waters of the county of Monmouth, in the State of New Jersey, and that finding in the record is *prima facie* evidence of the fact itself, and throws upon the plaintiff the burden of the proof on this point.

2. In refusing to charge the jury:

That the record of the said justices of the peace was conclusive against the plaintiff in said action as to all the facts passed upon by the said justices appearing in said record.

3d. In refusing to charge the jury :

That the said record is conclusive against the plaintiff in this action as to all the facts therein contained, excepting as to the question of jurisdiction, and that the jury should not regard the oral testimony given by the plaintiff, so far as it tends to impeach the findings contained in the said record, excepting as to the question of jurisdiction.

4th. In refusing to charge the jury.

That the said record of the said justices is conclusive against the said plaintiff in this action and that he has no right to review in this action the finding of the said justices, as contained in said record.

5th. In refusing to charge the jury :

That the oral testimony produced by the said plaintiff in this action, so far as it conflicts with the findings of said justices in said record, was immaterial, and should not be regarded by the jury in rendering their verdict.

6th. That the court erred in its order made in this cause, bearing date the third Monday of October, 1868, wherein it ordered " that judgment be entered " herein in favor of the said plaintiff (defendant in " error), and against the said defendant (plaintiff in " error) for the aforesaid amount of the said verdict, " with costs."

POINTS.

I.—The judgment in this case is based on the finding of the jury contradicting the record of condemnation by the justices.

The errors consist in the court treating this

record as only *prima facie* evidence of the facts contained in it, and in retrying the same questions collaterally in this action.

II.—The condemnation by the justices was under the 7th and 9th sections of an "Act of the Legislature of the State of New Jersey," revised and approved April 14th, 1846—Revised Statute of said State, pages 493, 494, which are as follows:

7. *And be it enacted:* That it shall not be lawful for any person who is not at the time an actual inhabitant and resident of this State, and who has not been for six months next preceding an actual inhabitant or resident as aforesaid, to rake or gather clams, oysters or shell fish, either on his own account and benefit or on account and benefit of his employer, in any of the rivers, bays or waters of this State, on board of any canoe, flat, scow, boat or other vessel; and every person who shall offend herein shall forfeit and pay twenty dollars, to be recovered and applied in the manner directed by the first section of this act; and the said canoe, flat, scow, boat or other vessel, used and employed in the commission of such offense, with all the clams, oysters, clam rakes, tongs, tackle, furniture and apparel, shall be forfeited, and the same seized, secured and disposed of in the manner described in the ninth and tenth sections of this act.

9. *And be it enacted:* That it shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons, to seize and secure any such canoe, flat, scow, boat or other vessel, as aforesaid, and immediately thereupon

give information thereof to two justices of the peace of the county where such seizure shall have been made, who are hereby empowered and required to meet at such time and place as they shall appoint for the trial thereof, and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offense shall have been committed, and the other half to the person who shall have seized and prosecuted the same.

Transcript of Record, p. 8.

III.—This act shows that the tribunal rendering the decree of condemnation was legally constituted, and defines its powers and jurisdiction and manner of proceeding.

IV.—It is stated in the opinion of the court below, "that in a proceeding *in rem*. it may be true that the judgment rendered therein is conclusive upon all parties interested with one qualification, namely, that the court had jurisdiction of the subject matter and if the record of the judgment on the face of it, as in the present case shows jurisdiction, it will be held conclusive until the contrary is proved. But when set up to affect the rights of a party, either in a direct proceeding or collaterally, it is always competent for him to aver and prove the want of jurisdiction."

1st. In a direct proceeding this is true.

2d. In a collateral proceeding, this is not the rule in the broad sense in which it is stated, for if the vessel is either seized or brought within the territorial jurisdiction, and *it is so determined* by the tribunal authorized to try the question, its judgment is conclusive.

3d. It is only in a case where there is no pretense the condemned property was seized or brought within the jurisdiction of the tribunal passing its decree that it is competent to aver and prove in a collateral proceeding want of jurisdiction.

4th. If the seizure of the *Whitman* had been made on the high seas, and the vessel had never been brought within the jurisdiction of New Jersey, the rule laid down by the court below, citing *Rose* v. *Himely*, might apply, but in this case there was a municipal seizure, made within the dominions of the sovereign power, and the statute upon which it was based carefully and strictly complied with. It is well settled law that the jurisdiction of the court is not open to review, collaterally, under such circumstances.

V.—The ninth section of the act above-recited authorizes *any person* to make the seizure *any where* in the State, and thereupon give information to two justices of the peace of the county where such seizure shall have been made.

It is conceded that the seizure was made in the State, but it is claimed, because the jury found it was not made in Monmouth county, that it is void.

This is erroneous; it is at most an irregularity, not open to inquiry when brought before the court collaterally.

After the trial and condemnation of a vessel under this statute, the owner not appearing and making defense, he cannot allege and prove in another action brought for taking his property, that his vessel was seized in one county and information given and trial had before two justices of another county, and hence that the proceedings are void, it appearing upon the face of the record that the fact was otherwise. The magistrates were bound to inquire as to the fact, and having found the seizure was made in their county, their finding is conclusive of it.

Brittain *v.* Kinnaird, 1 Brod. & Bing., 432.

The northern boundary of Monmouth county is declared to be the middle or midway of the waters of Raritan bay, from the line of Middlesex to the main channel which passes by Sandy Hook, and along the said channel to the sea.

The first article of the treaty between New York and New Jersey declares "the boundary line to be the middle of Raritan bay to the main sea."

Nixon's Digest M., pp. 147, 148, 822, 823.
N. Y. Rev. Stat., vol. I., M., p. 65.
U. S. Stat. at Large, vol. 4, p. 708; Judge's charge, p. 24.

The main channel passing by Sandy Hook crosses and runs southerly of a line running through the middle of Raritan bay to the main sea, leaving a strip of territory in the waters of New Jersey northerly of the Monmouth line, and it is here that the jury fixed the seizure. The justices, however, found otherwise. They found and adjudged that the information given them by

Michael Fay, to wit: that the *Ann L. Whitman* was seized on the 26th day of September, 1862, in the county of Monmouth, was true; that she was so seized and secured while gathering clams contrary to the form of the statute in such case made and provided.

VI.—The proceedings of the justices are collaterally called in question here, and it appears on the face of them that the subject matter was within their jurisdiction; they are, therefore, voidable only. They are mere irregularities, if anything, and are to be corrected by some direct proceeding either before the same court to set them aside, or in an appellate court.

Voorhis *v.* The Bank of the United States, 10 Pet., 478.
Blaine *v.* The Ship *Charles Carter*, 4th Cranch, 328.
Cooper *v.* Reynolds, 10 Wallace, 308.
United States *v.* Arredondo, 6 Pet., 730.
Comstock *v.* Crawford, 3 Wallace, 396.
Story's Conflict of Laws, 7th Ed., secs. 591, 592.
Grignon, Lessee, *v.* Astor, 2 Howard, 319, 340.

VII.—This was a court of limited and special authority, and its jurisdiction appears upon the face of its proceedings. Its action cannot be collaterally attacked for mere error or irregularity.

Its jurisdiction appearing by its own record, the same presumption of law arises that it was rightly

exercised as prevails with reference to the action of a court of superior and general authority.

Comstock *v.* Crawford, 3 Wallace, 403.
1 Brod. and Bing., 432.

VIII.—The proceedings before the justices were proceedings *in rem.*, which brings all parties interested before the court to plead.

Miller *v.* United States, 11 Wallace, 268, 328.
Gelston *v.* Hoyt, 3 Wheaton, 246, 312.
Croudson *v.* Leonard, 4 Cranch, 434.
Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 609.
Mankin *v.* Chandler, 2 Brockenborough, 125, 127.
The Globe, 2 Blachford, 427–431.

IX.—If the information was made in the wrong county it would at most be an irregularity that might, on a proper motion in that court or on appeal, be a cause of dismissal, but the irregularity must be rectified in the proper manner there. "But of this irregularity no foreign court could take notice."

Hudson *v.* Guestier, 4 Cranch, 241, 294.
Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600–610.

X.—In the case of Rose *v.* Himely, 4 Cranch, 269, referred to in the decision of the court below, neither the vessel nor the captain, supercargo, nor crew, were ever brought within the jurisdiction of the

court, nor within the dominion of the sovereign whose laws were infracted; nor was the seizure made within his dominions. The jurisdiction of the court over the subject of its sentence, it was held, never attached; the proceedings were entirely *ex parte*, and the sentence not to be regarded. But the principle of that case was afterwards overruled in Hudson *vs.* Guestier, 6 Cranch, 281, 285, so in that case the record was conclusive.

In the case now before this court, leaving out the facts contained in the record of condemnation, the vessel was seized within the State of New Jersey, as the act provided it might be done anywhere in the State, and she "was then taken up the Shrewsbury River," as shown by plaintiff's testimony, page 15, which lies wholly within the county of Monmouth, where the information was lodged and the trial and condemnation had. She was in the actual custody of the law and proper authorities of the county where tried. The *res* or party, so to speak, was in the actual custody and possession, and within the territorial boundaries of the jurisdiction of the tribunal trying and condemning, for the purpose of such trial and condemnation.

XI.—The record of condemnation by the justices shows a complete chain of legal formalities judiciously framed to meet the statute.

An information in the nature of a libel was given to the justices by the person seizing, pages 18, 19, who thereupon appointed a time and place for the trial, page 19, and gave notice thereof to Whitman, the defendant in error, pages 17, 19, and on the day appointed the complainant appeared and the defendant in error did not appear, when the pro-

ceedings were again adjourned and notice again given to the defendant in error of the time and place fixed for the trial, when the justices proceeded to hear the case and give judgment of condemnation (p. 20).

These proceedings were complete under the statute. The notice was in excess of the law, and unnecessary.

XII.—The New Jersey statute is not unusual. The fisheries are the property of the States, and the spirit of legislation and of the decisions of the courts has been, thus far, to protect them against non-residents.

1 Kent's Com., 6th ed., 27.
Rogers *v.* Jones, 1 Wend., 238.
Laws of New York, vol. 4, *b*, p. 248.
New York Session Laws of 1866, chap. 404.

XIII.—The judgment of the Circuit Court should be reversed, and judgment given for the plaintiff in error.

Hudson *v.* Guestier. 6th Cranch, 285.

— CHAS. N. BLACK, —
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

JOSEPH J. THOMPSON, Plaintiff in Error,

vs.

JOHN WHITMAN, Defendant in Error.

Statement, Brief and Points in behalf of the Defendant in Error.

STATEMENT OF THE CASE.

This case comes into the Supreme Court in Error to the Circuit of the United States for the Southern District of New-York.

The Oyster Law of New-Jersey, approved April 16, 1846, §§ 7, 9, 10, (see Record, pp. 8 and 9,) provides, that no person who was at the time an actual inhabitant and resident of that State, and who had not been such for six months next preceding, should rake or gather any clams, oysters or shell fish within the State, and imposes a penalty for so doing, and forfeits the vessel so employed. The act further provides, that any sheriff, &c., should seize any vessel so offending, and that an information shall be given to two Justices of the Peace

of the County where such seizure is made, who shall try the issue and order sale of vessel, &c., &c.

By the compact between New-York and New-Jersey the boundary line is fixed, (see Record, p. 24,) by a line drawn through the middle of the Hudson River, of the Bay of New-York, of the waters between Staten Island and New-Jersey, and of Raritan Bay to the main sea.

The limits of the County of Monmouth, before two justices of which the vessel was taken, are by the statute of New-Jersey (see Record, p. 26) declared to be "the middle or midway of the waters of Raritan "Bay from the line of Middlesex to the main channel "which passes by Sandy Hook, and along the main "channel to the sea."

For an alleged violation of this law the "Ann L. Whitman" was seized on September 26, 1862, condemned and sold under a proceeding instituted under the act before two justices of the peace of Monmouth County.

This action, originally commenced in the State Court, and removed under the act of Congress to the U. S. Circuit Court, was commenced to recover damages therefor.

At the trial the plaintiff gave testimony tending to show that he had taken no clams on the day in question within the State of New-Jersey, and that the vessel was seized seven or eight miles from Coney Island, and four or five miles from the Jersey shore, *in the main ship channel.*

The defendant gave testimony to show that clams had been caught on that day, and that the seizure was made south of the main ship channel, and within the County of Monmouth, and introduced at length all the proceedings for condemnation before the justices. (See pp. 18 and 19 of Record.) The plaintiff had notice of the proceedings, but did not appear.

The court, after refusing to direct a verdict for the defendant, submitted certain questions to the jury. (Record, p. 26.)

(1.) Whether the seizure was made within the State of New-Jersey.

(2.) Whether the seizure was made within the County of Monmouth.

(3.) Whether the plaintiff was engaged on the day of the seizure in taking clams within the County of Monmouth, and State of New-Jersey.

In charging the jury, the court instructed them that the division line between the two States, (see p. 25 of Record,) running from the starting point to the main sea, divided all the waters between the Hudson River and the main sea in the centre, and charged that the words "main sea," as used in the treaty, were synonymous with ocean, and that the boundary line between the two States extended through the middle of all this body of water, by whatever name it might be called, (see page 26 of Record,) "to the ocean, or at "least to the great ship channel which passes from "New-York Bay east of Staten Island by Sandy Hook "to the sea or ocean," and said, "It is sufficient for "the purpose of this case that we follow the boundary "line as far east as that channel. Of course all that "part of these waters that lies south of this line are "within the territorial limits of New-Jersey."

The jury (page 28) stated that they found the seizure was made IN the channel, and upon answering the questions submitted to them by the court, found that the seizure was made within the State of New-Jersey, but not within the limits of the County of Monmouth; that the plaintiff was not engaged on that day in taking clams within the limits of the County of Mon-

mouth, and assessed the damages of the plaintiff at $3,500.

The jury therefore found upon a disputed question of fact, that the seizure was made beyond the limits of the County of Monmouth; and as the act provided that the proceedings for condemnation should be taken in the county in which the seizure was made, the justices had no jurisdiction. Although many questions were discussed in the case, this would seem to be conclusive.

Two arguments were had before Mr. Justice Nelson for a new trial, upon the second of which the verdict is distinctly upheld on this ground. The opinion of Mr. Justice Nelson will be found as an appendix to this brief.

Certain exceptions were taken during the trial, which will be refered to in order.

I.

The finding of the jury on the questions submitted to them is conclusive of the case.

The justification of the plaintiff in error failed, unless he proved the allegations contained in the plea.

(1.) That on the 26th day of September, 1862, the defendant in error was engaged with his vessel in taking clams within the limits of the County of Monmouth, and State of New-Jersey.

(2.) That being so engaged, the vessel was on that day seized within the limits of the County of Monmouth.

The defendant in error, at the trial, by several witnesses, (Record, p. 15,) introduced testimony to show that the vessel in question was an enrolled sloop of

about 50 tons; that no clams had been taken on that day within the State of New-Jersey or County of Monmouth; and that "the sloop was seven or eight miles "from Coney Island at the time of the seizure, nearer "the Jersey shore than the New-York shore; four or "five miles from the Jersey shore, and seven or eight "miles from Coney Island, *in the main ship channel*."

The plaintiff in error (Record, pp. 16, 17) gave testimony tending to show that the vessel had taken clams on the day in question south of the main ship channel and within the County of Monmouth, and that the vessel was seized "about half way between Sandy "Hook and Port Monmouth dock, about half a mile "south of a line drawn from Port Monmouth dock "to Sandy Hook dock, and nearly three miles south "of the middle of the main ship channel that runs "by Sandy Hook, south by west of the southwest "spit buoy."

After patiently hearing the testimony of a cloud of witnesses on these points, the jury found on both issues in favor of the defendant in error, finding specifically that the plaintiff had not been so engaged on the day in question, and that the seizure was made *in the channel* and beyond the limits of the County of Monmouth; such limits being, as fixed by statute, as follows: "The northern bounds of the County of Mon- "mouth are declared to be the middle or midway of "the waters of Raritan Bay, from the line of Middle- "sex to the main channel, which passes by Sandy "Hook and along the said channel to the sea."

With these findings this court will not interfere.

To authorize a seizure and condemnation under the provisions of the Act of the State of New-Jersey of April 16, 1846, (see Act *in extenso*, p. 78,) the offence

must have been committed in the State of New-Jersey; and the proceedings for condemnation and forfeiture must be taken before two justices of the county within which the seizure was made.

§ 9, (p. 8, Record:) "It shall be the duty of all "sheriffs and constables, and may be lawful for any "other person or persons, to seize and secure any such "canoe, flat, scow boat or other vessel as aforesaid, and "immediately thereupon give information thereof to "two justices of the peace of the county where such "seizure shall have been made, who are hereby em-"powered and required to meet," &c., &c.

It is evident, therefore, that a justification, based on this statute, utterly fails either where no offence has been committed authorizing a seizure, or where the proceedings for condemnation and forfeiture are taken before an officer without jurisdiction.

The Sheriff might as well assume to seize any vessel at his pleasure, or to condemn her himself.

The fact that he was a Sheriff, engaged in carrying out the provisions of a highly penal statute, called for a careful observance of the provisions of the act.

The opinion of Mr. Justice Nelson on the motion for a new trial is conclusive on this question.

II.

The questions submitted to the jury were open questions. The record of the proceedings of the justices was not conclusive evidence against the plaintiff on the questions of fact involved.

(1.) Such proceedings are not within Section 1, Article 4 of the Constitution of the United States.

Judgments of justices of the peace are not entitled to full faith and credit. They have no greater effect

than foreign judgments. The judge at the trial (Record, p. 28) instructed the jury that the record was *prima facie* evidence of the facts, and shifted the burden of proof on the defendant.

This was correct.

See Article 4 of *Articles of Confederation.*
Story on Constitution, § 1303.
Art. 4, § 1, *Constitution of the U. S.*
Act of Congress, May 26, 1790.
Warren *vs.* Flagg, 2 *Pick.* 448, 450.
King *vs.* Gilder, 1 *D. Chipman Rep.* 59.
Greene *vs.* Briggs, 1 *Curt. C. C.* 311.
Cox *vs.* Groshong, *Burn*, (*Wis.*) 150.
Opinion Mr. Justice Nelson, Appendix.

(2.) The record and judgment are not conclusive as a proceeding *in rem.*

In every proceeding *in rem*, as well as in every judgment made conclusive by the provisions of the act of 1790, the jurisdiction of the tribunal over the subject matter or parties may be inquired into.

This is true, whether the judgment be set up in a direct proceeding to affect the rights of a party or collaterally.

The record in the present case on its face shows jurisdiction, and jurisdiction was therefore presumed; but the foundation of any judgment, the right to hear and determine the controversy in question, in other words, the jurisdiction, may always be inquired into.

Rose *vs.* Himely, 4 *Cranch*, 241.
Eliott *vs.* Peirsoll, 1 *Pet.* 628.
Christmas *vs.* Russell, 5 *Wall.* 293, 304.
Harvey *vs.* Tyler, 2 *Wall.* 340.
Voorhes *vs.* Bank of U. S., 10 *Pet.* 473.
Hickey *vs.* Stewart, 3 *How.* 750.
Warren Manuf. Co. *vs.* Ætna Ins. Co., 2 *Paine*, 501.

III.

The act of the State of New-Jersey of April 16, 1846, is unconstitutional.

On an examination of the act in question it will be found that the act cannot be supported as a police regulation affecting any particular class or classes of the community alike, and intended for the preservation of the fisheries or the regulation of the enjoyment thereof; nor as a provision and declaration on the part of the State of New-Jersey as to who shall be allowed to fish, or take shell fish upon land owned by that State exclusively, as distinguished from private ownership; but the act in question, in the broadest sense, discriminates between residents and inhabitants of the State of New-Jersey and non-residents, and makes an act not *malum in se* a cause of fine and forfeiture, and a misdemeanor if engaged in by a non-resident. (§ 7, Record, p. 8.)

"That it shall not be lawful for any person who is "not at the time an actual inhabitant and resident of "this State, and who has not been for six months next "preceding an actual inhabitant or resident as afore-"said, to rake or gather clams, oysters or shell fish, "either on his own account or benefit, or on account "and benefit of his employer, in any of the rivers, "bays or waters of this State, on board of any canoe, "flat, scow boat, or other vessel."

And the supplement of March 19, 1851, (Record, p. 11,) makes any person offending guilty of a misdemeanor.

The various sections of the act following § 7 have no

reference to non-residents. The exclusion of any person, not a resident, is without qualification or limit.

Under this act a non-resident owner, or person in the employ of such owner, cannot gather shell fish planted by him on his own land, without being guilty of a misdemeanor; and the act further assumes to confine the right to take shell fish to *such* citizens of the State of New-Jersey as shall have been for six months next preceding, actual inhabitants and residents.

The words "rake or gather," in the act in question, cannot be construed as a regulation of the right of fishery, within the decision in

Smith *vs.* Maryland, 18 *How.* 71.

As such words are used, in the act in question, as synonymous with *take*.

Such being the character of this act, excluding non-residents of the State of New-Jersey from these rights and privileges, and in like manner excluding therefrom even citizens of the State of New-Jersey who have not been actual citizens and residents for six months next preceding, it is insisted, on behalf of the defendant in error, that the act is repugnant to the Constitution of the United States.

Constitution U. S., Art. 4, § 2.
Paul *vs.* Virginia, 8 *Wall.* 168.
Passenger Cases, 7 *How.* 400,
License Cases, 5 *How.* 504.
Smith *vs.* State Maryland, 18 *How.* 71.
Ward *vs.* Maryland, 12 *Wall.* 418.
Brown *vs.* Maryland, 12 *Wheat.* 449.

IV.

The act in question is unconstitutional, provided the same has any application to enrolled and licensed ves-

sels as an interference with the powers of the federal government to regulate commerce, &c., and with the admiralty and maritime jurisdiction of the United States; and as authorizing a seizure without warrant, process or previous judicial action, authorizing condemnation without notice to the owner, or due process of law, and not providing for a jury trial.

The proceeding is a proceeding to enforce a penalty created by statute, and the offending party is entitled to notice and a trial by jury.

See Art. 1, § 7, Constitution of N. J.

It is not enough to say that the seizure is notice.

The seizure is by the act a penalty against the individual for his individual offence.

V.

After the finding of the jury on the questions necessary to give jurisdiction above discussed, a discussion of the jurisdiction of the States of New-York and New-Jersey, pursuant with the compact between them over the waters of the bay of New-York, and adjacent to the seizure in question, becomes unnecessary and immaterial. While positive views on this question may be entertained by the two States, and have been somewhat discussed in this case, no such question properly arises here.

The charge of the judge at the trial will be found at pp. 25, 26, charging that the line between the two States extended from the centre of the Hudson River through the middle of Raritan Bay, and through all the waters by whatever name they might be called to the main sea, or, at least, as far east as the main ship channel which passes from New-York Bay east of

Staten Island by Sandy Hook to the sea or ocean ; to which no exception appears.

As we have seen, to give the justices jurisdiction it was not enough that the seizure took place within the State, but the proceedings for condemnation must take place before justices of the county in which the seizure was made.

If the jurisdiction of the State of New-Jersey actually extended over that portion of the bay in which the seizure was made, and if the place was within the State of New-Jersey, then that State had not seen fit to make the point of the seizure a part of the County of Monmouth.

It may have been a part of some other county, or of no county.

It is a matter for the State itself whether all of the State shall be laid out into counties or not.

Manley *vs.* The People, 7 *N. Y. R.* 295.
Mahler *vs.* The Norwich Trans. Co., 35 *N. Y. R.* 352.

If, on the other hand, the jury erred on this point, and the place of the seizure was within the State of New-York, or a portion of the high seas, such facts are conclusive against the plaintiff in error.

The jury found the place of the seizure to be without the county, and that question was properly submitted.

United States *vs.* Jackalow, 1 *Black.* 484.

VII.

The jurisdictional questions involved in the case are conclusive, and while it is insisted that no errors were committed on the trial, yet were any of the exceptions well taken, no new trial would be granted.

A new trial will not be granted where the error has not affected the verdict or prejudiced the case, or where the verdict can otherwise be justified.

Opinion Nelson, J., Appendix.
Allen *vs.* Blunt, 2 *Woodb. & M.* 121.
Matter Marsh, 6 *Law Rep. N. H.* 67.
Benjamin *vs.* Smith, 12 *Wend.* 404.
Crary *vs.* Sprague, 12 *Wend.* 441.

It is insisted, however, that none of the exceptions are well taken.

The offer to prove that the vessel in question had been engaged in dredging for clams on the 23d, 24th and 25th September, was rightfully excluded, as the plea charged the offence to have been committed on the 26th. The exceptions, (page 28,) on the refusal of the judge to charge that the record was conclusive, have been already noticed.

VII.

The judgment should be affirmed.

JOHN L. CADWALADER,
WILLIAM M. EVARTS,
Of Counsel.

APPENDIX.

UNITED STATES CIRCUIT COURT—SOUTHERN DISTRICT.

Before Judge Nelson.

JOHN WHITMAN *ex.* JOSEPH I. THOMPSON.—NELSON, C. J.—This is a motion for a new trial. A suit in trespass was brought by Whitman against Thompson, for seizing and carrying away by force and arms, in the lower bay of New-York, a certain vessel called the Ann L. Whitman, her tackle, furniture, &c., and disposing of the same.

The defendant plead the general issue, and, also, a special plea, setting up that the plaintiff, an inhabitant and resident of New-York, was, at the time of the seizure, engaged with his vessel within the waters of the State of New-Jersey, and within the boundaries of the County of Monmouth, of said State, in dredging for clams, contrary to an act of the Legislature of New-Jersey; and that the defendant, being Sheriff of the County of Monmouth aforesaid, seized and carried away the vessel in pursuance of the authority of said act; and immediately gave information to two justices of the peace of the County of Monmouth, before whom such proceedings were had, that the said vessel was condemned and sold by direction of the said justices, and according to the provision of the act aforesaid. On the trial the record of condemnation by the justices was given in evidence, with much other testimony relating to the seizure, the locality within which it was made, and the business in

which the plaintiff and his vessel were engaged at the time.

The jury found a special verdict: first, that the seizure was within the waters of New-Jersey; second, that it was not made within the limits of the County of Monmouth; third, that the plaintiff was not engaged at the time in dredging for clams, and assessed the damages of the plaintiff at $3,500.

This motion has been argued twice before us. The first time, principally, upon the question whether or not the court erred in the charge respecting the boundary line between the States of New-York and New-Jersey, which was insisted on the part of the plaintiff; but which question we do not decide. The second argument has been confined to the questions involved in the case, even assuming the boundary line to be as stated in the charge of the learned judge; that is, whether or not the plaintiff is entitled to have judgment, or the defendant a new trial, or, a verdict to be entered for him on the special finding. As we have seen, the jury found that the seizure of the vessel was not made within the limits of the County of Monmouth.

The act of New-Jersey, applicable to the case, provides, substantially, that it shall be the duty of all sheriffs and constables, or other persons, to seize any vessel engaged in raking and gathering clams in the waters of the State by persons not actual inhabitants or residents thereof, and thereupon give information to two justices of the peace of the *county where such seizure shall have been made*, who are thereby empowered to meet at such time and place as they may appoint, and hear and determine the same; and in case the vessel shall be condemned, it shall be sold by the order and under the direction of the said justices, &c. The special plea in the case is founded upon this provision of the act, and avers that the defendant seized and secured the vessel within the waters of the State and *within the boundaries of the County of Mon-*

mouth, and immediately thereupon gave information to the two justices, &c.

It will be seen by the finding of the jury, in connection with this act of New-Jersey, that the two justices had no jurisdiction over the vessel by virtue of the seizure, inasmuch as it had been made out of the limits of their county. It is insisted, however, on the part of the defendant, that the record of the condemnation of the vessel is conclusive upon this fact, that the seizure was made within the county. A transcript of this record is before us, and so finds. It adjudges that the information is true; that the said Whitman did rake and gather clams, &c., with the vessel, within "the waters of Raritan Bay aforesaid, in the County of Monmouth and State of New-Jersey." It has been urged that this judgment of the justices is within the provision of the Constitution by which "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of any other State." But the act of Congress, May 26, 1790, has given a different interpretation to it, or at least an interpretation that excludes the record in question, and such has been the decision of the courts. But we do not suppose, even, if the record was entitled to the verity claimed, it could vary its legal effect in the present case.

It is also urged that this is a proceeding *in rem*, and that the judgment rendered therein is conclusive upon all parties interested. This may be true, with one qualification, namely, that the court had jurisdiction of the subject matter, and if the record of the judgment, on the face of it, as in the present case, shows jurisdiction, it will be held conclusive until the contrary is proved. But when set up to affect the rights of a party, either in a direct proceeding or collaterally, it is always competent for him to aver and prove the want of jurisdiction. (4 *Cranch*, 269, 270; *Story's Conflict of Laws*, secs. 609, 692.)

It is also urged, that inasmuch as the jury found that